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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 296

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED, PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 12, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED, PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1] **TRANSCRIPT OF RECORD**

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia, begun and held at the Court Room thereof in the Post Office Building in the City of Richmond, Virginia, on the first Monday in the month of October, being the sixth day of the same month, in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable Luther B. Way, Senior United States District Judge for the Eastern District of Virginia, and The Honorable Robert N. Pollard, United States District Judge for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

Before the Honorable Robert N. Pollard

Civil Action. No. 129

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Plaintiff,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Defendant

COMPLAINT—Filed January 17th, 1941

1. Plaintiff is and has been duly appointed, qualified and acting executor of the Estate of John Lewis Tiller, Deceased, who died on March 21, 1940, as the result of injuries sustained as hereinafter described.

2. Before and at the time of the injuries sustained by plaintiff's decedent resulting in his death, all of which is herein complained of, defendant owned and operated a [fol. 2] railroad extending through the State of Virginia and several other states and was a common carrier engaged in commerce between the several states, territories, District of Columbia, and foreign nations; and the injuries complained of occurred while it was engaging in such commerce and while plaintiff's decedent was employed by defendant in such commerce, his duties being in furtherance of interstate and foreign commerce and directly, closely and

substantially affecting such commerce. This action is brought by plaintiff for the benefit of the surviving widow and minor child, the dependents of the decedent, under and pursuant to the provisions of 45 U. S. C. A. Section 51-60, and acts amendatory thereto, known as the Federal Employers Liability Act.

2. On or about March 20, 1940, the defendant was engaged in shifting, coupling, and uncoupling cars from one train to another on its tracks in or about the South Richmond stockyards near Clopton Road, Stop 5, Petersburg Pike, Chesterfield County, Virginia, in order to make up the cars for a southbound freight train.

3. While defendant was thus engaged, plaintiff's decedent was performing his duties as an employee of defendant and was inspecting the seals on various freight cars and performing other services.

4. Defendant's officers, agents and servants, other than plaintiff's decedent, acting within the scope of their employment, then and there performed the operations in which they were engaged in a careless, reckless, unlawful and negligent manner in that while they knew or in the exercise of ordinary care should have known full well the position of the decedent and the work in which he was engaged, they failed to keep a proper lookout for him, to give proper signals warning of the approach of the train, to keep the head car properly lighted, or lighted at all, to warn deceased of a hitherto unprecedented and unexpected change in the manner of shifting the cars although they knew full well that such a change would place him in a position of [fol. 3] extreme danger, if he were not so warned, to operate their train, engine and cars in a careful and prudent manner under the circumstances then and there existing, to furnish deceased a reasonably safe place in which to work, and in other respects and particulars, by reason of and as a result of all of which a car propelled by defendant's engine and operated by its crew ran up against, struck, dragged, ran over, crushed and mangled decedent, causing him severe and grievous injuries from which he suffered excruciating agony and pain for many hours during which he was conscious until his resulting death on March 21, 1940. After the deceased was thus injured, bleeding profusely and in a severely critical condition, defendant's

servants, agents, officers and employees did not exercise ordinary care in providing prompt and adequate medical treatment and attention for deceased, but on the contrary carelessly and negligently left deceased for some hours unattended by medical doctors and hospitals and failed to procure an ambulance, all of which caused great loss of blood and suffering to deceased, and all of which failures to exercise ordinary care in an emergency contributed to his death. Prior to these injuries, decedent was a strong, able-bodied man capable of earning and actually earning $185.00 a month. At the time of his death, he was fifty-one (51) years of age. Decedent's dependents, who are his widow and minor child, have also suffered great pecuniary loss and damage as a result of his fatal injuries and death.

5. This action is commenced within one year from the date of decedent's fatal injuries.

Wherefore, plaintiff demands judgment against the defendant in the sum of Fifty Thousand ($50,000.00) Dollars and costs.

(Sgd.) Dave E. Satterfield, Jr., Richmond Moore, Jr., Attorneys for Plaintiff, 1407 State-Planters Bank Building, Richmond, Virginia.

[fol. 4] Tucker, Bronson, Satterfield & Mays, Counsel.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury.

(Sgd.) Dave E. Satterfield, Jr., Richmond Moore, Jr., Attorneys for Plaintiff, 1407 State-Planters Bank Building, Richmond, Virginia.

Tucker, Bronson, Satterfield & Mays, Counsel.

ANSWER—Filed February 6, 1941

[Title of court and style of case omitted]

For a First Defense

(a) The defendant admits the allegation of paragraph one of the Complaint.

(b) Defendant admits that it is a common carrier by railroad, engaged in interstate commerce; it admits that the injuries complained of occurred while defendant was en-

gaged in such commerce and while plaintiff's decedent was employed by it in such commerce.

(c) Defendant alleges that at or about 7 P. M. o'clock on March 21, 1940, it was engaged in shifting, coupling and uncoupling cars from one train to another and from one track to another on its tracks in its railroad yards just south of the City of Richmond, in Chesterfield County, Virginia, known as Clopton Yards, in order to make up a regular southbound freight train. One of the regular duties of plaintiff's decedent was to ride and protect said southbound freight train. Defendant is without knowledge sufficient to permit it to affirm or deny whether at the time plaintiff's decedent received the injuries of which complaint is made, he was inspecting the seals on the various freight cars, or was actively performing other services, or was preparing to perform services. Defendant, on the other hand, avers [fol. 5] that there were no eye-witnesses to the accident in which plaintiff's decedent was killed; that whether he was killed in alighting from a moving train and stepped immediately in the path of a cut of cars moving in the opposite direction, or whether he was standing upon the tracks upon which said cut of cars was approaching, or whether he had fallen upon said tracks from a moving car before he was struck by said cut of cars are all matters of speculation, guess and random judgment, and can form no basis for legal liability.

(d) Defendant admits that while it was thus making up said southbound freight train, plaintiff's decedent was struck by a moving cut of cars in the said railroad yard, but it denies that it, its officers, servants or employees other than plaintiff's decedent were guilty of any negligence whatsoever in the premises, and it denies each and every allegation of negligence contained in paragraph four of the Complaint.

For a Second Defense.

Defendant alleges that plaintiff's decedent assumed all risks normally and necessarily incident to his employment. He knew that the shifting of cars and the making up of a train in a railroad yard after dark is attended by much danger, and the risks normally and necessarily attendant on such operations were assumed by plaintiff's decedent.

The injuries and death of plaintiff's decedent were the proximate result of a risk thus assumed by him.

For a Third Defense.

While defendant denies that its officers, servants or employees other than plaintiff's decedent were guilty of any negligence whatsoever, nevertheless, defendant alleges that if plaintiff's decedent was negligently injured as alleged in the Complaint, the plaintiff's decedent, himself, was guilty of contributory negligence in that, knowing that he was at work in a place of continual danger, he failed to keep a proper lookout for his own protection and failed to heed [fol. 6] the approach of cars being moved by an engine, but, on the contrary, carelessly and negligently permitted himself to be struck by a car so propelled, and that this negligence on the part of plaintiff's decedent proximately contributed to his injuries and death; or that plaintiff's decedent negligently alighted or fell from a moving train immediately in the path of a cut of cars moving in the opposite direction.

(Sgd.) J. M. Townsend by C. D. F. Collins Denny, Jr., Richmond, Virginia, Attorneys for Defendant.

J. M. Townsend, Denny, Valentine & Davenport, Counsel.

Legal and timely service of a copy of the written answer is hereby acknowledged this 6th day of February, 1941.

(Sgd.) Richmond Moore, Jr., Counsel for Plaintiff.

Motion to Strike Out Second and Third Defenses of Defendant—Filed February 13, 1941

[Title of court and style of case omitted]

The plaintiff moves the court to strike out the second and third defenses set up by defendant in its answer heretofore filed herein, upon the ground that they are both jointly and severally insufficient in law.

(Sgd.) Richmond Moore, Jr., Attorney for Plaintiff, 1407 State-Planters Bank Building, Richmond, Virginia.

Notice of Motion

To: Collins Denny, Jr., Attorney for Defendant, Richmond, Virginia.

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court on the 24th [fol. 7] day of February, 1941, at 9:30 o'clock A. M., or as soon thereafter as counsel may be heard.

(Sgd.) Richmond Moore, Jr., Attorney for Plaintiff, 1407 State-Planters Bank Bldg., Richmond, Virginia.

Legal and timely service of the foregoing motion is hereby acknowledged this 13th day of February, 1941.

(Sgd.) Collins Denny, Jr., Attorney for Defendant.

Order on Motion to Strike Out Second and Third Defenses of Defendant—Entered and filed February 24, 1941

Civil Action File No. 129

Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, Deceased, Plaintiff,

v.

Atlantic Coast Line Railroad Company, a Virginia Corporation, Defendant.

Upon consideration of plaintiff's motion to strike out the second and third defenses set out in the answer, it is ordered that the determination thereof be postponed until the trial of this Cause.

(Sgd.) Robert N. Pollard, United States District Judge.

February 24th, 1941.

Motion for Leave to Amend Complaint—Filed March 21st, 1941

(Title of Court and style of case omitted)

The plaintiff, Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, deceased, moves the Court for leave to amend its complaint herein as follows:

In paragraph 1 next to the last line amend March 22, 1940, to March 21, 1940.

In paragraph 2 first line amend March 21, 1940 to March 20, 1940.

In paragraph 4 twenty-third line amend March 22, 1940 [fol. 8] to March 21, 1940.

(Sgd.) Dave E. Satterfield, Jr., Richmond Moore, Jr., Attorneys for Plaintiff, 1407 State-Planters Bank Bldg., Richmond, Virginia.

Notice of Motion

To: Collins Denny, Jr., Attorney for defendant, Travelers Building, Richmond, Virginia.

Please take notice that the undersigned will bring the above motion in for hearing by the Court on the 21st day of March, 1941, at nine-thirty o'clock A. M., or as soon thereafter as counsel may be heard.

(Sgd.) Dave E. Satterfield, Jr., Richmond Moore, Jr., Attorneys for plaintiff, 1407 State-Planters Bank Bldg., Richmond, Virginia.

Legal and timely service of the within notice is hereby acknowledged this 20th day of March, 1941.

(Sgd.) Collins Denny, Jr., Attorney for defendant, Travelers Building, Richmond, Virginia.

Order Amending Complaint—Entered and filed March 21, 1941

Civil Action File No. 129.

Hattie Mae Tuller, Executor of the Estate of John Lewis Tiller, Deceased, Plaintiff,

v.

Atlantic Coast Line Railroad Company, a Virginia Corporation, Defendant.

This day came the parties hereto by their attorneys and upon motion the plaintiff is hereby granted leave to amend her complaint as follows:

1. In paragraph 1 thereof next to the last line amend [fol. 9] March 22, 1940 to March 21, 1940.

2. In paragraph 2 first line amend March 21, 1940 to March 20, 1940.

3. In paragraph 4 twenty-third line amend March 22, 1940 to March 21, 1940.

And the Clerk is directed to make the amendment thereof accordingly.

(Sgd.) Robert N. Pollard, United States District Judge.

March 21, 1941.

REQUEST FOR ADMISSION—Filed September 3, 1941

(Title of Court and style of case omitted)

Plaintiff, Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, deceased, requests defendant, Atlantic Coast Line Railroad Company, to make the following admission for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the following statement is true: "The physical layout of defendant's system of railroad tracks in Clopton yards, both at the Clopton road crossing and within a mile in all directions therefrom, remained unchanged from the time of the injuries to decedent, March 20, 1941, until September 1, 1941."

You are requested to make reply hereto on or before September 17, 1941.

(Sgd.) Dave E. Satterfield, Jr., Richmond Moore, Jr., Attorneys for Plaintiff, 1407 State-Planters Bank Building, Richmond, Virginia.

A Copy of this request for admission has been delivered [fols. 10-12] to Collins Denny, Jr., Attorney for defendant, Travelers Building, Richmond, Virginia this 3rd day of September, 1941.

(Sgd.) Dave E. Satterfield, Jr., Richmond Moore, Jr., Attorney for Plaintiff.

[fols. 13-69] **Joint Appendix to Briefs of Appellant and Appellee**

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH DISTRICT

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Plaintiff,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia corporation, Defendant.

No. 4909

STIPULATION

It is hereby stipulated by and between counsel for the parties herein that, since the portions of the certified transcript of record designated by appellant herein to be printed as an appendix to its brief incorporate certain portions of the certified transcript of record which the appellee desires to be printed as an appendix to its brief, the parties hereto agree to print the following as a "Joint Appendix" to the briefs of both parties herein.

Dated at Richmond, Va., this 3rd day of March, 1942.

COLLINS DENNY, JR.,
J. M. TOWNSEND,
Counsel for Appellee.

RICHMOND MOORE, JR.,
Counsel for Appellant.

JOINT APPENDIX TO BRIEFS OF APPELLANT AND APPELLEE

IN THE

United States Circuit Court of Appeals

FOURTH CIRCUIT

No. 4909

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED,
APPELLANT,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION.

REPORTERS TRANSCRIPT

(2-4)

MR. TOWNSEND: May it please the Court, our friends have asked us to agree that a report which was made of this accident to the State Corporation Commission may be intro-

duced. That report was made under the provisions of Section 3988 of the Code of Virginia, which is the same as the section of the Interstate Commerce Act which provides that monthly reports shall be made to the State Corporation Commission. The language is exactly the same in the two codes except that one is to be made to the Corporation Commission and the other to the I. C. C.

Section 41 of the U. S. C. A. provides that neither said report, that is the monthly report which is to be made of accidents, nor any report of said investigation, nor any part thereof, shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation. That has been interpreted by the editors of the Code in this language—I first thought this was a part of the Act but I find it is merely an editorial comment: "Neither the report required by Section 38 of this Title nor any report of the investigation provided for in Section 40 of this Title nor any part thereof, shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation."

So that the report to the Interstate Commerce Commission is absolutely out, under the provisions of that statute. There was a slight difference in the report which was made to the State Corporation Commission and that made to the I.C.C. These gentlemen asked that we agree that that is a copy of the report made to the State Corporation Commission. We agree that it is a copy but we do not think it is competent evidence because we think that the public policy announced by the section of the Code that the I. C. C. reports shall not be evidence should also govern in a case under the Employers Liability Act which is governed entirely by Federal rules and Federal practice and we think the public policy of the United States would prohibit the introduction of the report to the State Corporation Commission in this case.

THE COURT: Do you gentlemen intend to offer the report to the State Corporation Commission in evidence?

MR. MOORE: Yes, sir.

THE COURT: You do not intend to offer the report to the I. C. C.?

MR. MOORE: No, sir.

THE COURT: Do you intend to refer to it in your opening statement?

MR. MOORE: Yes, sir.

* * * * * *

(6)

THE COURT: I am not ruling now on the admissibility. Statements of counsel are not evidence. I rule at this time that counsel may refer to the report in the opening statement and when the report is offered in evidence I will make a specific ruling on that.

MR. TOWNSEND: May we refer to the way in which those reports are made up?

THE COURT: You can refer to what you expect to prove, yes, sir, in regard to how the reports are made up, in your opening statement.

MR. TOWNSEND: If your Honor pleases, we note an exception to the ruling of the Court.

* * * * * *

(7-12)

HATTIE MAE TILLER, the plaintiff, being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

Q. Are you the wife of John Lewis Tiller, deceased? A. Yes.

Q. When were you married? A. November 22, 1930.

Q. And where do you live? A. 2606 Barton Avenue.

Q. How long have you lived there? A. 25 years.

Q. Have you any children, Mrs. Tiller? A. Yes, one.

Q. A boy or girl? A. A boy.

Q. How old is your little boy? A. 6 years old.

Q. Is this he? A. Yes.

Q. By whom was your husband employed? A. Atlantic Coast Line Railroad.

Q. How long had he been in the employ of that company? A. 16 years.

Q. What was his duty or title with the company, if you know? A. Sergeant of Police.

Q. What was the date of his death? A. March 22, 1940.

Q. Where did he die? A. Grace Hospital.

Q. Do you recall what time he left home on the 20th day of March, 1940? A. Around 6 o'clock.

Q. In the afternoon? A. Yes.

* * * * * *

Q. What was the state of your husband's health previous to this accident? A. Very good.

Q. His hearing? A. Very good.

Q. His sight? A. Very good.

Q. Was he a man addicted to strong drink? A. Not at all. He did not drink.

Q. Was he a large or small man? A. He was large.

Q. Do you recall his weight? Do you know his weight? A. Yes, around 200, I should say—6 feet.

Q. What was Mr. Tiller's age, Mrs. Tiller? A. He was fifty-one at the time this happened.

Q. He had passed his fifty-first birthday? A. Yes.

* * * * * *

Q. What became of his flashlight? A. I have that. It was given to me.

Q. Who gave it to you? A. One of the Coast Line employees.

Q. Do you recall the gentleman's name? A. Mr. Angle.

Q. I hand you this and ask you is that your husband's flashlight, the one he had on the evening of March 20th? A. Yes.

Q. When Mr. Tiller usually went out on this particular run, what time would he return to your home? A. Around five in the morning.

* * * * * *

MR. SATTERFIELD: I want the flashlight in evidence after it has been identified.

THE COURT: Is there any objection?

MR. TOWNSEND: No, sir.

(The flashlight was filed and marked Plaintiff's Exhibit No. 1)

* * * * * *

MR. SATTERFIELD: There were two witnesses who were excused, Mr. Dementi and Mr. Noland who will identify this photograph.

THE COURT: Do you want to introduce that picture?

MR. SATTERFIELD: I ask that it be received in evidence.

(The photograph referred to was filed and marked Plaintiff's Exhibit No. 2)

(13-17)

WILLIE MASON MYRICK, a witness called by the plaintiff and being first duly sworn, testified as follows:

* * * * * *

EXAMINED BY MR. SATTERFIELD:

Q. How long altogether have you been in the employ of the railroad company? A. Ever since the 31st of December, 1918, up to the present time.

Q. And you have been an engineer since 1924? A. Yes.

Q. Are you what is known as road engineer or yard engineer? A. Both.

Q. Do I understand by that that you serve in whatever capacity you are called to serve? A. I serve any capacity in which my seniority rights entitle me—to preferred jobs.

Q. On March 20, last year, 1940, were you on duty as an engineer for the Atlantic Coast Line Railroad Company? A. March 20?

Q. 1940. A. Yes, sir.

Q. Were you on Clopton Yard the night that Mr. Tiller was fatally injured? A. Yes, sir.

Q. Were you in charge of an engine on that occasion? A. Yes, sir.

Q. Was it a road or yard engine? A. Road engine.

Q. What was the number of it? A. 1635.

Q. What was the reason for your presence in Clopton Yard on that evening? A. For the benefit of taking that train from Clopton to South Rocky Mount.

Q. Where did you get your engine that day? A. Acca Roundhouse.

Q. Is that a terminal of the R. F. & P. Railroad Company to the north of Richmond? A. And the Coast Line.

Q. When you got your engine what were your instructions at Acca? A. We don't get any instructions from Acca. We get our instructions just before we leave the yard with our train. Our conductor gives us our instructions.

Q. Who was your conductor on this occasion? A. Mr. Wilbur.

Q. And what were your instructions? A. My instructions was to go by way of Clopton. I don't know exactly how it should be worded but offhand that is practically it. I was to go by the way of Clopton. I don't know whether the instruction read "Look out for yard engine", but that is practically the way we get our instructions, to go by the way of Meadow and call up sometime before we cross over from Meadow to the old line.

Q. The purpose of going to Meadow—will you tell the

Gentlemen what that was for? A. That is for taking the train from South Richmond to South Rocky Mount, in other words, from Clopton to South Rocky Mount.

Q. When you say take the train from South Richmond, do you refer to the train that comes from Byrd Street Station down the old Coast Line tracks to Clopton Yard? A. Yes, sir.

Q. How many cars did you carry away from Acca as you started in the direction of Meadow and Clopton on that evening? A. I don't know the amount of cars that we had. I judge it was a small amount of cars. I might say it was twelve or fifteen.

Q. And you arrive at Clopton at what time? A. I don't know the exact time I arrived at Clopton. It was about six o'clock, I guess.

Q. At Clopton? A. Yes, sir. I don't know exactly the time I arrived at Clopton.

Q. What time did you leave Acca? Would you have any idea about that? A. No, sir, I did not.

Q. What time were you called for duty that day? A. We were called for 6:30.

Q. You didn't leave before 6:30, did you? A. No, sir.

Q. Did you proceed immediately from Acca to Meadow and Clopton Yard? A. No, sir, we come down to the yard and backed up in the R. F. & P. yard and got the remains of our train and proceeded to Meadow and get instructions from the Yardmaster to cross over and what is necessary for us to do.

Q. You come over by way of the Belt Line bridge, don't you, and then by way of a switch down what is known as the old James River Line into Meadow? A. That is right.

Q. How long does it take you after you get started to come from the R. F. & P. freight yards to the point where you stopped on the Meadow track? A. I would say about fifteen or twenty minutes.

Q. Mr. Myrick, here is an aerial photograph which has been offered in evidence. Will you point out if you can, on

this, for the benefit of the jury, the track on which your train came in from Acca? A. I broke my glasses.

* * * * * * *

(17-26)

Q. This would be north and this would be Richmond. This is on the way to Petersburg and this is Clopton Yard and here is the stock yards and here is your yard office. Do you orient yourself? A. Yes, sir.

Q. Show the jury on what track you came in. A. It was up here where we come down on the old line from Meadow to this office and stopped.

Q. Which one of those two tracks were you on? A. This track is headed south?

Q. Yes. A. We were on the right track, this track over here.

Q. The far track? A. Yes.

Q. Show the jury where you stopped? A. We stopped here on the brow of the hill just north of this office.

Q. And what was your next order? A. The next order—then we received instructions from our Yardmaster, which was Mr. Jones, to pull down clear of this slow siding and back in the clear by his direction and on a signal from the trainman.

Q. What trainman? A. Mr. Dickens.

Q. Mr. Dickens is the brakeman on that train? A. That is right.

Q. In consequence of that order what did you do? A. We backed in the slow siding.

Q. First, before you backed, what did you do? Did you go with your train? A. No, we cut off three cars on the brow of the hill.

Q. Tell these gentlemen what you mean by "cut off three cars?" Do you mean you left three cars there or you cut three off and took with you? A. We held to three cars.

Q. What kind of cars were they? A. They were gondolas, high side gondolas, the way they are worded.

Q. What kind of freight do they carry? A. Coal and gravel and cement and so forth.

Q. And you cut three of those off the train and proceeded on that track on the far side of the picture up in the yard? A. That is right.

Q. And after you got up in the yard what did you do? A. After we got up in the yard we received a signal to back in this slow siding.

Q. Point out to the jury the slow siding into which you backed. A. This is the track here and here is the slow siding over that crossing.

Q. How many tracks are there on the main line of the Coast Line? A. Two.

Q. Point them out. A. Here are the two tracks over here.

Q. That is the Meadow track? A. That is right.

Q. I am talking about on the old main line of the Coast Line. A. The old main line is the track I come down.

Q. What are these tracks? A. This track here is the system—

Q. Where is the main line northbound in that picture? A. The main line northbound?

Q. Southbound. A. Here it is (indicating).

Q. What is that next track? A. That is the slow siding.

Q. Is that the track you backed down on? A. Yes, sir.

Q. You went up in the yard, the switch was thrown, and you came back down this slow siding; is that it? A. That is right.

Q. And were three cars being pushed or backed up by your engine? A. That is right.

Q. What was the purpose of that move? What were you doing that for? A. The purpose of that move was authorized by the yard foreman—in other words, the yardmaster, to back in that slow siding for the purpose of classifying the train that we brought there from Byrd Street Station.

Q. What was the matter, if anything, with the classification of the train brought from Byrd Street Station? A. It was an error in the classification at Byrd Street Station.

Q. What was the error? A. The error was that it was a car in the wrong classification.

Q. Do you mean by that that they put a car in the wrong place in the train that came from Byrd Street Station? A. Yes, sir.

Q. What had to be done with it? A. That car had to be classified at Clopton Yard.

Q. What do you mean by "classified at Clopton Yard?" A. It had to be put in a track until the right evidence could be got on that particular car. It was in a classification for one destination and it was in the wrong classification.

Q. Do you mean it had to be put in the right place in your train when you went out? A. That is right.

Q. Where was that car going, do you recall? A. No, I do not.

Q. When you proceeded to back up your engine, tender, and these three cars, who was in the cab of the engine with you? A. My fireman, Mr. Wright.

Q. Who was on the rear end of those cars or on the front end of those cars as they were backed up? A. Mr. Dickens, my trainman.

Q. He is the brakeman, isn't he? A. Yes, sir.

Q. You were on the engineer's seat which would put you on the left side of this train going in a back-up movement, wouldn't it? A. Yes.

Q. And Mr. Wright was on the fireman's seat, was he? A. Yes, sir.

Q. And that would put him on the right-hand side of the cab on a back-up movement? A. That is right.

Q. As you moved back into that slow siding was there any train moving in an opposite direction on your right-hand side or on the fireman's side of your engine? A. Yes, sir.

Q. Which train was that? A. That was the train that came from Byrd Street Station.

Q. As you went back to the road crossing I want you to tell the Gentlemen of the Jury what happened, in your own way. A. When we stopped, when the cars that we taken

away from Clopton come from Byrd Street Station, they stopped somewhere near the crossing and when I received a signal from Mr. Dickens we pulled off with the head end cut which was second 209 classification and we pulled off the second time and when they pulled off the second time my trainmen give me the signal to back up. We made a back-up movement when the other portion of the train that had come from Byrd Street Station was going ahead.

Q. Mr. Dickens was on what part of that car that was on the front of your back-up movement? A. He was on the leading car up to the crossing.

Q. What part of the car was he on? Where was he riding? A. He was on the left side on the back-up movement.

Q. What part of the car was he riding on? A. Head end.

Q. What part of the head end of the car was he riding on? A. That was the front end.

Q. Was he on top of the car? A. He was on the side.

Q. How was he riding? A. He rode on the step of the car with the hand holds and I guess you might say with both hands on the grab iron, which we call it, the step iron, for the purpose of going up on top of the car.

Q. When you saw him he was riding on the step with both hands on the grab iron? A. Yes, sir.

Q. Did you see him—Mr. Dickens—get off that car? A. Yes, I saw him get off the car just about the time it got to the crossing or near the crossing.

Q. When it got to or near the crossing and he got off, which way did he go? A. When he got off he come back toward me which was the head end of the engine.

Q. Was your train stiil moving slowly across when he started back toward the head end? A. Yes, sir.

Q. When did your train stop and where did it stop? A. The engine and tender stopped practically on the crossing. You might say the rear end of the engine and the front end of the tender stopped about on the crossing.

Q. Did any of you know then that Mr. Tiller had been hurt? A. No, sir.

Q. What happened in the cab of your engine from that point on? A. When we stopped at the crossing I would say we stayed there for—I won't say how many minutes or seconds it was, but Mr. Wright excited my curiosity by saying that he saw a flashlight which was on the east side, on his side. He said, "I see a flashlight over here burning."

Q. Did you look? A. I asked him. When he made the remark that "I saw a flashlight over there burning", I thought it was some of the members of our crew had lost a light and I told him to go and get the light. He said, "No, I am afraid to go down in the dark by myself; you come go with me." I thought, "All right, I will go along with him." In the meantime, when I got off the engine to go down to investigate the light to see who it was, or whether it was any of our trainmen, I had a thought in my mind about Mr. Tiller and I went on and started toward the flashlight and I asked my fireman Wright—I said, "Mr. Wright, have you a flashlight?" I said, "Let me have it, please." He give me his flashlight and we walked on by the light and flashing the light under the side of each car and we saw something black about the second car from the engine—I mean about the first car from the engine. That was Mr. Tiller's cap. When we saw Mr. Tiller's cap it was plain evidence that something had happened to Mr. Tiller, so we went on a little bit further, which was about the second car, and we saw Mr. Tiller's gun and that was unbreached—what I mean, the chamber was out—and after going on and seeing the gun, that was further evidence that Mr. Tiller had been hurt somewhere, some place of the train. So we walked on up a little bit further and I flashed my light up under the north end of the car which was the rear end of the head car, and I saw the evidence up there balled up under the wheels.

Q. What was that? A. That was Mr. Tiller.

Q. Was he still alive—conscious, I mean—when you got to him? A. He wasn't conscious when we first got to his aid. He didn't regain consciousness until we got him out in the condition that we found him in.

Q. Did somebody pour some water on him? A. Yes, sir.

Q. When he did regain consciousness did you hear him say anything, Mr. Myrick? A. Yes, sir.

Q. What did he say? A. He asked what hit him and how did he get hurt.

Q. What was his position there when you got to him under the north end of that head car? A. He was balled up between the brake and the wheel, you might say in the hanger.

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(27)

Q. What did you do then? A. I got straddle, you might say, and pulled the brake shoe and hanger back from the wheel which was on the portion of his leg that you might say was pushed up about the center of the wheel and we worked his leg down and got him down clear of the outside and straightened him out between the two tracks.

Q. Were other members of the train crew there at that time? A. No other members, other than myself and Mr. Dickens.

Q. Mr. Dickens? A. Yes.

Q. Was Mr. Wright with you? A. Yes, sir.

Q. What time would you say the accident occurred, or do you know? A. When we got Mr. Tiller out I looked at my watch and I made a remark to Mr. Wright that it was 7:15 and I taken the number of the car but I don't recall the number now.

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(27-28)

Q. Let me ask you this: Your train was stopped there. What had become of the train that was moving south? A. He was gone. He was then making his other classification on the brow of the hill. In other words, he was making his other movement to the portion of the train that I had brought from Acca.

Q. He was south of the road? He had gone down past

this road in the direction of Petersburg, hadn't he? A. Yes, sir.

Q. And that left you on this slow siding with your three cars and I believe your tender, and Mr. Tiller? A. That is right.

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(29-30)

Q. How long have you been handling that particular assignment, Mr. Myrick? A. Well, we are not assigned to that particular train every day.

Q. You have been since 1924 an engineer? A. Yes, sir.

Q. And from time to time you, like other engineers, get that assignment, do you not? A. That is right.

Q. Have you ever, in all of your experience and in all that period of years, ever made that movement before? A. No, sir.

Q. Was there any street light or any kind of a light there at Clopton Road where you cross over, where the tracks cross over that road? A. No, sir.

Q. Was it dark when the accident happened? A. Yes, sir.

Q. Have you any idea how high those three cars are that you were backing up? A. About ten foot.

Q. Are they the steel open cars that carry coal mostly? A. Yes, sir.

Q. Are they known as hopper cars? A. Yes, sir.

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(31)

Q. How close to that road did you find that flashlight? A. We found the flashlight just about here (indicating).

Q. What would be approximately the distance, would you say, from the edge of the road? A. I would say about four or six foot from the crossing.

BY THE COURT:

Q. North or south of the crossing? A. North of the crossing.

By Mr. Satterfield:

Q. You say the cap was the next thing you picked up? A. Yes, sir.

Q. And that was how far from the flashlight? A. That was about the head car from the engine.

Q. What part of the head car—front, middle or back? A. About the front end.

Q. Then the flashlight was found almost under the tender of the engine that you were operating? A. Just about.

Q. How much further on from the cap was the pistol? A. You mean from the pistol?

Q. Yes. A. We had passed by the cap when we found the gun.

Q. I mean how much further on was the gun from the cap? A. It was about the next car which was about the second car.

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(32-33)

Q. When you got over this road going northward with Dickens flagging you on that end, did you blow your whistle? A. No, sir.

Q. You had your bell ringing? A. Yes, sir.

Q. And when you had your bell ringing was this train moving southward at the same time on the track next to you? A. Yes, sir.

Q. Did you know Mr. Tiller? A. Yes, sir.

Q. How long had you known him? A. I have been knowing Mr. Tiller about ten or twelve years previous to the accident.

Q. Will you state to the jury whether or not on other occasions you had seen Mr. Tiller there in the yard? A. Yes, sir, I have seen him there several times, daylight and night.

Q. Doing what? A. Doing his duty.

Q. And what was that? A. That was protecting the train, to see if there were any cars broken open and see if any contents had been taken from them or any seals broken.

Q. Where would he usually stand to check those seals? A. He was at various places. I have seen Mr. Tiller on one or two different occasions. You see, most anybody can get off a train with a flashlight at night and you couldn't say that was Mr. Tiller but in daytime I have seen Mr. Tiller get off at that crossing once or twice, to my knowing.

Q. You knew from time to time he checked those cars there as they came by? A. That was his duty.

Q. You have seen, at night when it would go by, him flash it off and on, haven't you? A. Yes. I couldn't say it was Mr. Tiller but it was some agent attending to his business, flashing the light on the seals to see whether they were broken or the car being bothered with from the time it left the Byrd Street Station.

Q. When you would see him in the daytime would he be standing on the slow siding? A. He would be somewhere near this crossing.

(33-36)

CROSS EXAMINATION

BY MR. DENNY:

Q. Mr. Myrick, let us go a little further with the yard situation and see if I correctly have what you say. The lower part of this picture is north with the tracks running due north and south, so Richmond is down below the picture. I understand that you came in from Acca and Meadow on the track shown on this picture, on the extreme west track, up on the hill? A. Which is the right.

Q. Which is the right-hand track or the extreme west track in the whole picture? A. Yes, sir.

Q. Then in the center of the picture and north of Clopton Road you find three tracks parallel to one another. The extreme east track or the one nearest Petersburg Pike is the northbound main line track, is it not? A. Right.

Q. The middle track is the southbound main line? A. That is right.

Q. And the western of the three tracks is what is known as slow siding? A. That is right.

Q. When you brought your train in from Acca, you came in on the western track up on the hill and stopped, as I understand it, before you got to Clopton Road and north of Clopton Road. A. Right.

Q. A cut was then made and you held to these three empty coal hoppers? A. That is right.

Q. And you proceeded south across Clopton Road, well down into the yard, so that a switch, which is not shown on this picture at all— A. Yes, sir.

Q. Is that southern switch here shown the switch to which you went? A. That is the switch.

Q. In other words, right at the very top of the picture is the switch. A. That is right, the dark place up here.

Q. You had to pull south of that switch? A. Yes, three car lengths.

Q. And then that switch was thrown and you backed your cars going north in the slow siding? A. Right.

Q. Mr. Myrick, can you give us any estimate of the percent of time during a month, we will say, that you may be out at Clopton in connection with the make-up of 209, as one of the engineers? A. Well, I would say—you mean the amount of days in a month?

Q. Yes, through the years. Are you on that run two days a month or three days a month? A. Well, I reckon it would average up—I reckon the record would show it would average up about five or six days a month.

Q. For how long a time prior to this accident would you say that you had been on that run an average of five or six days a month? Had that lasted all the way from 1924 or from some later date? A. No, you see from 1924 it was numbers of times that I was in the yard service and I didn't have no opportunity whatever to be in road service which would permit me to be at this particular place any time during any period of that month.

Q. About when did you get sufficiently far in the road

service to begin to be assigned to this freight train 209? A. I was marked up on a regular job the 11th day of December and I remained.

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(36-41)

Q. The 11th day of December, 1940? A. Yes, sir.

Q. Do you mean 1940 or do you mean 1939? A. 1939 was when Mr. Tiller was hurt. 1940 was this last past year, what I am alluding to, this particular time. In 1940 I was marked up on a regular job, the 11th of December, and was cut out of a regular job the 8th of August.

Q. You mean the 8th of this past August? A. Yes, sir.

Q. 1941? A. Yes, sir.

Q. Let us leave the time since Mr. Tiller's death. Back around the time of Mr. Tiller's death how often were you drawing that train? A. Just about, you might say, I reckon the record would show that I would make about an average trip in there five or six days per month.

Q. For how long prior to Mr. Tiller's death had you been on that train an average of five or six times a month? A. That has been practically ever since Mr. Tiller's death.

Q. I say before Mr. Tiller's death. A. Oh, before Mr. Tiller's death I would say it was months that I wasn't in Clopton Yard at all.

Q. So that before Mr. Tiller's death on just occasional times were you on that run? A. Well, I reckon we are not assigned to any regular run and in freight work we work first in and first out. I would say I would average in two or three trips per month.

Q. And that had gone on for about how long? A. That had gone on for about, I reckon, from about 1938.

Q. So that beginning about 1938 you had averaged two trips a month up to Mr. Tiller's death. For about two years prior to his death you had been in there a couple of times a month? A. Yes.

Q. Mr. Myrick, Clopton Yard, as I understand it, is a

freight classification yard where the freight trains are assembled? A. Yes, sir.

Q. In classifying the various cars so as to make up the train necessitates the shifting of cars back and forth on various tracks repeatedly? A. Yes, sir.

Q. Are you gentlemen and all the employees of the railroad instructed that when at work in a classification yard they must watch out for their own safety and must watch for the movements of trains? A. Yes, sir.

Q. Is that, so far as you know, thoroughly understood by all railroad employees, that warnings and signals will not be given in a classification yard but each man must watch those movements for himself? A. You mean are you alluding to now?

Q. In a classification yard is a man directed that he must watch these shifting movements and guard himself against injury, that there are not people there watching out for him? A. That is right, everybody other than the trainmen. The trainmen look out for each other's signals.

Q. On this particular night after Mr. Dickens, your brakeman, had made a cut at the rear of the third coal hopper, he gave you, I suppose, the signal to proceed on down the hill? A. South of the slow siding.

Q. Then after he threw the switch did he give you the signal to start backing up? A. Yes, sir.

Q. Did you see what he did after he gave you that signal? A. He rode the head car on or near the crossing.

Q. Could you see him on that head car? A. Yes, sir.

Q. Could you see him or could you simply see the lantern that he was carrying? A. I could see the lantern directly that he was carrying.

Q. In other words, it was dark. A. Yes, sir.

Q. And you saw a lantern—someone holding a lantern on the lead end of the lead car? A. Yes, sir.

Q. Did you see any other light up north of you around that crossing? A. No, sir, I did not.

Q. I suppose you were facing to the north in the direction you were going, were you not? A. Yes, sir.

Q. And as you looked to the north around that crossing did you see anyone showing a flashlight? A. No, sir, I did not.

Q. How high up off the ground would you say Mr. Dickens had this lantern? A. Well, Mr. Dickens was about five foot six, I would judge, and he was on the step of the car.

Q. So that would put the lantern up around the middle of the car in height? A. Yes, sir, I guess so, about the middle of the car.

Q. Was the cut of cars out of Byrd Street which had come in on the southbound main line moving there across Clopton Road as you were backing up? A. The first cut was.

Q. The first one? A. Yes, sir.

Q. So that you had your movement going north and you had the movement of the Byrd Street cars going south. Your movement was north, wasn't it? A. Yes, sir.

Q. And the movement of cars from Byrd Street was south? A. That is right.

Q. And they were on parallel tracks? A. Yes, sir.

Q. Was your bell ringing? A. Yes, sir.

Q. You have an automatic bell, I believe? A. Yes, sir.

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(41)

Q. I understand that the flashlight was found about four feet north of Clopton Road? A. Yes, about four to six feet.

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(41-42)

Q. Did you see whether Mr. Dickens rode all the way into Clopton Road before he stepped off your cars or could you saw when Mr. Dickens stepped off the cars? A. Mr. Dickens stepped off the car on or near the crossing.

Q. On or near the crossing? A. Yes. He was supposed to look out for the safety part of that crossing until after it covered the crossing.

Q. And he kept all the way down to protect the crossing on that? A. Yes, sir.

Q. Was Mr. Tiller a large man? A. Yes, sir.

Q. Do you know what his weight was? A. Mr. Tiller was a heavy man, heavier than I am, and I weigh 203.

Q. You weigh 203 and Mr. Tiller was heavier than you? A. Yes, sir.

Q. Do you know what his height was? A. I am five foot eleven and I would say Mr. Tiller was about the same.

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(43-45)

REDIRECT EXAMINATION

BY MR. SATTERFIELD:

Q. That trainman was not at the rear end of your three cars, was he, when he gave you the signal to stop? A. He wasn't at the rear end when he gave me the signal to stop.

Q. Tell the jury where he was. A. He was near this highway crossing when he give me the signal to stop.

Q. He was beyond the front end of your locomotive going in the other direction, wasn't he? A. Yes, sir.

Q. Why was he going up to that end of the yard? What was he going to do? A. He was going up there after the yard force had made their classification and he would have to change the switch again in order to let me out of the slow siding.

Q. So the same gentleman who was on the rear end of your train as it backed up was the man who gave you the signal to stop after you had passed him and he was in front of your locomotive, south, was he not, of this road? He was down in the yard? You stopped your engine and your tender on the road, didn't you? A. Yes.

Q. Where was he? A. Mr. Dickens was on the north side of me when he give me the signal to stop.

Q. Were you still moving? A. When he give me the signal to stop I was moving on to him but you don't stop

right now. In other words, we were moving on in there slow and Mr. Dickens got off, you see, and give me the signal to stop.

Q. You stated a moment ago that Mr. Dickens got off at or near that crossing? A. Yes, sir.

Q. As your three cars and your engine and your tender went on north before you got the signal from him to stop, what part of your train was paralled with Mr. Dickens when he gave you the signal to stop? A. Mr. Dickens was about at the middle of the car next to the engine, north of me.

Q. When he gave you the signal to stop? A. Yes, sir.

Q. And you stopped? A. Yes, sir.

Q. And what did he do then? A. I stayed there.

Q. What did he do then—Mr. Dickens? A. Mr. Dickens come on then up to the switch at the slow siding.

Q. You mean these switches south of Clopton Road? A. That is right.

Q. I want to ask you, Mr. Myrick—you were sitting in the engineer's seat, I believe you stated to the jury, which would be on the left of your train in a back-up movement? A. Yes, sir.

Q. In front of you ordinarily there is nothing but the boiler of the locomotive when you are running head on? A. That is right, when you are head on.

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(45-46)

Q. When you are running head on you can see a good deal across and in front of your locomotive, can't you, when it is in a normal operations. A. Yes, sir.

Q. Will you state to the jury whether it is possible for you to do that when you have got the tender and three cars in front of you as you push up? A. Could I see Mr. Dickens?

Q. Can you see across the right-hand side of the tracks when you have got three coaches in front of you? A. No, sir.

Q. Mr. Dickens was on the side of the car, I believe you said, holding on to the step? A. Yes.

Q. When you say the center of the car, you don't mean he was around at the front end of the car? A. No, sir, the side step is on the side of the car.

Q. Do I understand you to say Mr. Dickens didn't go all the way across that road crossing? A. Mr. Dickens got off on or near the crossing.

BY THE COURT:

Q. While your train was being moved? A. Yes, sir.

Q. And where was he standing when he gave you the signal? A. He was on or near the crossing when he gave me the signal.

Q. Was he north or south of the crossing? A. You might say he was on the crossing.

Q. Where was he standing when your train came to a stop? A. He was standing practically at the same place that he gave me the signal to stop.

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(47)

RECROSS EXAMINATION

BY MR. DENNY:

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Q. You did not come to a stop, as I understand it, at the point you did stop because you had any knowledge or suspicion that anyone was hurt? A. No, I didn't have any idea anyone was hurt.

Q. It was just to clear the switch? A. The trainman evidently knowed I was in the clear when he stopped me at the point he wanted me to stop.

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(53-54)

ERNEST H. WAMACK, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

. . . . . .

Q. Are you in the employ of the Atlantic Coast Line Railroad Company? A. Yes, sir.

Q. In what capacity?

A. As a switchman.

Q. How long have you been in the employ of this company? A. 24 years.

Q. And as a switchman for how long? A. 24 years.

Q. Did you know the deceased, Mr. Tiller? A. Yes, sir.

Q. How long had you known him? A. I would say probably about eight years.

Q. Did you see the deceased, Mr. Tiller, on March 20, 1940, the day of this accident? A. Yes, sir.

Q. Where? A. I don't think that I saw him until after he was hurt. I spoke to him at the Byrd Street yard.

BY MR. DENNY:

Q. I couldn't catch that last. A. I spoke to Mr. Tiller at Byrd Street Station, at the freight station.

BY MR. SATTERFIELD:

Q. About what time? A. I imagine it would be around 6:15.

Q. That was before the yard engine had moved the train of freight cars, which is known as first section 209, out of Byrd Street Station? A. Yes, sir.

Q. Were you assigned as switchman on that first section of 209 the evening of the 20th of March, 1940? A. Out of Richmond, yes, sir.

. . . . . .

(54)

Q. That train that left with Mr. Tiller, was Mr. Linton the engineer of that train? A. Yes, sir.

. . . . . .

(56)

Q. Did you see Mr. Tiller? You said you never saw him until after the accident occurred? A. Not from the time I spoke to him in Richmond yard until after the accident occurred.

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(56-57)

Q. As your train came on the southbound rail it crossed over Clopton Road, didn't it? A. Yes.

Q. Were you still on the tender then? A. Yes.

Q. How far did you ride before you got off the tender? A. About two car lengths which would be about seventy feet.

Q. You stepped off then? A. Yes, sir.

Q. Did the train continue to move, the one on which you were riding southward? A. Yes, sir.

Q. Until how much, if any, of it had passed the Clopton Road? A. About 22 car lengths.

Q. And then what happened when 22 had passed? A. It stopped.

Q. How much of that did it leave of the train north of Clopton Road? A. I don't know exactly the number but I would imagine it would be around about 35 cars.

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(58-62)

Q. How many years have you been working for the company? A. I have been in train service 24 years. I have been with the company about 28 years altogether.

Q. During the time you have been in train service you have been frequently on that run or assignment, haven't you? A. Yes, sir.

Q. Have you seen Mr. Tiller on other occasions there in Clopton Yard checking car seals? A. Yes, sir.

Q. Night and day? A. Yes.

Q. Where would he usually stand to check them? A. In riding that train out there and observing Mr. Tiller and his movements in the past several years, I would say he would

always get off between the cross-over switch, as we call it, which would be probably 15 car lengths from Clopton Road crossing—anywhere from there up to the road crossing.

Q. Do I understand you to say in fixing the place where he usually alighted—you have not seen this? A. No, sir.

Q. This is the north side, the Richmond end, and this is the Clopton Yard office. Do you orient yourself? A. Yes, I think I have it.

Q. Will you show to the Gentlemen of the Jury the area within which he usually alighted from the train to make the car checks? A. All of this isn't on here. There is a cross-over switch that leads from here to the Clopton Road crossing. I observed Mr. Tiller would drop off anywhere below this switch up to the road crossing.

Q. Have you ever seen him use the road crossing to alight? A. Not paying any particular attention, I can't say that he alighted right on the crossing; somewhere about that. I am generally on the east side and he gets off on the west side.

Q. Have you seen him checking the slowing moving freight cars as they pass on southward, night and day? A. Yes, sir.

Q. How would he do it when it was dark? A. With a flashlight.

Q. Did you receive any instructions from the conductor of your train with reference to movements that would be necessary that night in the yard? A. I received instructions from the Yardmaster, W. J. Jones, that the move had to be made.

Q. Why was that move necessary? Did they tell you? A. They got a classification that was in the wrong classification that had to be classified.

Q. Translating that for the layman to understand it, do I understand you to mean they had a car in the wrong place that had to be put in the right place? A. Yes.

Q. You speak of a car in the wrong place as being badly classified or improperly classified? A. Yes.

Q. Do you recall to which place it was consigned, where it was going? A. I understand it was going to Jacksonville, Florida, the car that we cut in.

Q. The movement of that train which came in off the Meadow siding and which was under the operation of Engineer Myrick—did you see that train as it came backward on the slow siding with three cars in front of it in a back-up movement? A. I remember seeing it moving back. I think I went through from the east side to the west side to turn a valve that turns the air and I think while I was doing that he was backing down.

Q. You don't remember seeing him? A. I am pretty sure that I did see him in that movement, and we was making a movement at that time too.

Q. Mr. Wamack, in all your experience there in the yard was not that an unusual movement made by Engineer Myrick that night? A. No, I wouldn't say it is unusual. It has happened before.

Q. How often before? A. I wouldn't be able to estimate that but quite often we make that move.

Q. How often have you been on that particular run handling those trains 209? A. Ever since 1921.

Q. How many times in the last two or three years? Mr. Tiller was injured in 1940. Let us say for the years 1938 and 1939 or two years prior to 1940 how many times would you say a year that you were on that assignment? A. Well, I could easily estimate half of the time.

Q. Half of the time? A. Yes.

Q. How many times would you say per month you would make that move to get a car out of the wrong classification and use that slow siding in a back-up movement as Engineer Myrick did on that occasion? A. How many times would we make that movement?

Q. Per month that you would make that exact movement? A. We have about half of the time a classification to make on the two trains.

Q. I am not speaking about since 1940; I am speaking of

prior to 1940. A. I don't think I would be able to say as to how many times.

Q. I mean roughly, from your recollection, how many times would you say you would do it per month, the exact move that Engineer Myrick made on that evening, March 20, 1940, two years prior to 1940? A. I would say it may happen ten times a month or it may happen fifteen times per month or it may not happen in two months.

Q. Let us take it over a period of six months. Would you say it averaged more than three or four times a month or two or three times a month, year in and year out? A. Well, it would be hard for me to say.

. . . . . .

(63)

Q. (By Mr. Satterfield) How many times would you say it was done per year prior to the unfortunate accident that caused this man's death? A. Well, I tell you I don't think I could fairly answer that question and be anyways closely accurate about it.

Q. You don't think you could answer it accurately at all? A. No.

Q. Are you acquainted with the recent rules issued to you by the company in the bulletin book? A. Yes, sir.

Q. Was there a recent rule with reference to the flagging of crossings issued to you by the company? A. I think the company issued instructions somewhere, I will say, about two years ago.

Q. What was that rule with reference to crossings? A. With reference to protecting crossings when you have no other protection excepting you came up there with, say, a box car—

. . . . . .

(64)

A. I will say about two years, I think it is, that this bulletin was issued instructing the trainmen when they go over

a crossing that is not protected that they stop and flag over, protecting the public.

By Mr. Satterfield:

Q. What do you mean by "flag over"? What does that mean? A. That a trainman gets in the center of the crossing and it is clear and then he proceeds over.

Q. Proceeds all the way across the crossing? A. Yes, sir.

Q. And stops the train before it gets to the crossing? A. Yes, sir.

Q. And then flags it over, goes across the crossing and gets on? A. Yes, sir.

(64-68)

Cross Examination

By Mr. Denny:

Q. Mr. Wamack, does this rule or regulation that you just referred to apply to movements in a classification yard? A. Only at crossings.

Q. And it is for the benefit of the traveling public using the highway? A. Yes, sir, the rule was established for that.

Q. As I understand, for some years prior to Mr. Tiller's death you were on this run certainly fifty percent of the time, you think? A. Yes, sir.

Q. The yard engine goes out from the old Byrd Street Station, taking with it cars both for the freight train which you call First 209 and cars for the freight train which you call Second 209, does it not? A. That is right.

Q. First 209, which on this occasion was brought by Mr. Myrick from Acca, is a through fast merchandise freight, is it not? A. Yes, sir.

Q. And it takes only cars destined for Petersburg, Weldon and South Rocky Mount and points south of South Rocky Mount; is that correct? A. That is the general classification, yes.

Q. In other words, it does not carry with it any of the

local freight for stations between Richmond and Petersburg or between Petersburg and Weldon or between Weldon and South Rocky Mount? A. No, sir, that classification to Petersburg, Weldon and South Rocky Mount is the classification for First 209.

Q. Second 209 leaves later on in the evening carrying these local freights and less-than-carload lots, does it not? A. Yes, sir.

Q. So that when you go out of Byrd Street you have cars which are to go on the fast merchandise freight, known as First 209 and you also have cars to go on this local freight, which is known as Second 209, and when you get to Clopton Yards you have to take the cars that you have brought out and the cars of First 209 that comes from Acca and make up that fast merchandise freight to go south from Clopton Yards, do you not? A. That is correct.

Q. Is there anything unusual about you having to make classification movements over in Clopton Yards in cutting one train and putting it on another or shifting the position of a car? A. It is a daily occurrence.

Q. It generally occurs, does it not—a daily occurrence? That is what that yard is over there for, in part, to combine those two trains and make up the train that goes south, isn't it? A. That is what we use it for, yes, sir.

Q. On this particular night you came into Clopton Yards bringing this assortment of cars of which you have spoken, and as you approached Clopton Road, before you got to it, did the engineer have his train give his whistle signal? A. Correct.

Q. Did he ring his bell? A. The bell was ringing, yes, sir.

Q. Did he have an automatic bell? A. Yes, sir.

Q. I understand that you swung off the rear of the tender about two or three car lengths south of Clopton Road? A. That is right.

Q. Did you get off on the east or the west side? A. East side.

Q. Here is a picture, Mr. Wamack. This is south and

this is north, coming into Richmond. There are the stock yards and here is the track coming in from Acca up on the hill. You gentlemen, as I undestand it, came in on the southbound main line track, which is the center of these three tracks here, north of Clopton Road? A. That is right.

Q. And you stepped off on the east side or the Petersburg Turnpike side? A. That is right.

Q. And your train—not train because it was really a cut of cars that you were bringing—the cut of cars you were bringing out from Byrd Street kept on south and finally stopped with the engine perhaps 22 or 23 car lengths south of Clopton Road? A. That is right.

Q. I believe you said you received instructions from Mr. Jones to make a cut? A. That is ri at.

Q. How far south of Clopton Road was the point at which you had to make a cut in those cars? A. If this point is Clopton Road, I would say five car lengths above this.

Q. In other words, five car lengths south of Clopton Road is the point where you made the cut? A. Where we made the cut.

Q. After you made that cut did your engine, with the cars that were still attached to it, pull down to the south? A. Yes, sir.

Q. Had you been told what you were to do after you made that cut? A. Before I made that cut I was informed about cutting this car out—.

Q. Talk so the jury can hear you. A. When I dropped off here to make the usual cut of Second 209, I had to hold on to two more cars, being informed by Yardmaster W. J. Jones that we had a classification to make. So instead of making the cut where I was going to make it, I had to drop back two more car lengths.

. . . . . .

(69-71)

Q. What were you going to do after you made the cut? A. We made the cut here.

Q. That is south of Clopton Road? A. South of Clopton Road. First 209 out of Acca was holding this track.

Q. Up on the hill? A. Up on the hill just above this crossing. We cut off from here and go down to this cross-over, come back up to First 209 out of Acca standing here, coupled up one car and cut off.

Q. In other words, your engine was going to proceed south until it had cleared the switch so it could back up to join the cars left up on the hill? A. That was the movement.

Q. And it was your duty to go from the point on the southbound main line where you had made the cut over on the hill to couple up when your engine pushed that car back up there? A. That is right.

Q. On this occasion did you walk across to make that coupling or did you ride your cars down and then back up? A. I made the cut right here, five car lengths above this crossing. My conductor and the other switchman was at this cross-over switch.

Q. Further south of it? A. I walked over this way, that is to the west side, to see that this switch was lined up so that we could make this move up here.

Q. As soon as your engine and these lead cars had pulled out so as to permit you to walk over to the west side of the southbound main line, was slow siding clear or was any movement going on on slow siding when you crossed over to the west of the southbound main line? A. As well as I remember, when I crossed over here this man was backing down.

Q. You mean Mr. Myrick was backing into slow siding? A. First 209 out of Acca was backing down into slow siding.

Q. Carrying these three coal hoppers with it? A. I didn't know at that time what they had. I could only see the headlight of the engine.

Q. Did you have to stop there so as to let Mr. Myrick's engine and the cars he was pushing go by before you crossed over? A. As well as I remember, just as I walked around here, I think his engine was just clearing.

Q. From your testimony you were walking in a northwestwardly direction from the point where you had made the cut over to this point on the hill? A. That is right.

Q. You were on the east side of Mr. Myrick's back-up movement? A. At that time when I walked up—

Q. We are still down here. You crossed over the southbound main line? A. That is right.

Q. And you were going in this northwestwardly direction? A. That is right.

Q. You were between the slow siding and the southbound main line when you crossed over? A. Yes.

Q. Did you see any light or any movement of any kind of any person up to the north of you there at the point where Clopton Road crosses these tracks? Did you see anybody up there with a flashlight? A. I never noticed anyone or any move up there excepting the engine with its headlights because I was proceeding up here.

Q. You were proceeding over to get on the hill? A. To make a coupling.

Q. You were proceeding over to get on the hill? Did you see any reflection of a flashlight down there? A. No.

Q. Did you hear any cry or any unusual sound down there at the crossing? A. I never noticed anything unusual at all.

. . . . . .

(72-73)

Q. Mr. Wamack, I understand you to say that classification is a matter of daily occurrence? It takes place in the make-up of all freight trains? A. Yes, sir, that is our duty. That is my duty.

Q. Sometimes, depending upon what kind of cuts you have to make, you will use one set of tracks and other times you will use another set of tracks? Am I correct in that? A. That is right.

Q. Are you gentlemen constantly warned and instructed that when you are in a freight classification yard it is your duty to watch out for these shifting movements of trains

and to protect yourselves? Are those instructions given you? A. Yes, sir.

Q. There is nothing unusual in a classification yard about an engine pushing some cars as Mr. Myrick was pushing cars that night, is there? A. No, sir, that happens every day.

Q. They push cars almost as much as they pull them in classifying? A. Yes, sir.

Q. Is there any certainty in making a shifting movement in a classification yard that you will have a light on the head end? A. No, we don't carry any light or no protection. When we switch cars in a series of tracks there is liable to be three or four trains moving at the same time.

Q. You mean cars moving on three or four tracks at the same time? A. Yes.

Q. Every man who works around a freight yard knows that, doesn't he, of necessity? A. He should be acquainted with it, I think.

Q. Did Mr. Tiller, when he was on this run, always ride on your engine out from Byrd Street or did he sometimes come out to Clopton Yard by other means of locomotion? A. I have seen Mr. Tiller's car out there and I have seen him ride with Mr. Jones, the Yardmaster, and I have seen him use his car.

* * * * * *

(73-74)

Q. In other words, when you made up your cut of cars at Byrd Street to take out to Clopton, you didn't know whether Mr. Tiller was going to be on your cut or not, did you? A. No. The only way I would know he was on there, I would see him and sometimes he rode all over the train, from one end to the other. There was no particular place to ride and if I was on top I would probably see him or I may be on the engine and on the fireman's seat box which is the east side, and I might see him when he gets off over a period of time.

* * * * * *

Q. In the make-up of this train out of Clopton, from time to time have you seen Mr. Tiller down south of the railroad crossing? Have you ever seen him down south of the railroad crossing? A. Yes, I have seen Mr. Tiller all over the yard, from one end to the other.

Q. He didn't stay in one place, did he? A. I have seen him all over the yard—in other words, from the lower end of Clopton Yard all the way to Byrd Street Station.

* * * * * *

(77-79)

F. A. WILKINSON, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. MOORE:

Q. You are a section foreman for the Atlantic Coast Line Railroad Company, are you not? A. Yes, sir.

* * * * * *

Q. And what would be the distance between a train on the slow siding and one on the southbound main line if one of those trains had hopper cars in it?

* * * * * *

A. If one side had a hopper car, you would have three foot seven and one-half inches clearance.

Q. What would it be if both had hopper cars? A. You would have three foot three and one-half inches.

Q. That three feet three and one-half inches would be the distance between the two trains moving on parallel tracks? A. Yes, sir.

Q. Is there any street light at Clopton Road? A. No, sir.

* * * * * *

(79-81)

CROSS EXAMINATION

BY MR. TOWNSEND:

* * * * * *

Q. So you would have a clearance of four feet three and one-half inches, wouldn't you? A. That is right.

Q. Is that plenty of room for a man to walk between while the trains are going? A. Well, I will tell you they don't get much larger than I am and I walk through very handy.

* * * * * *

(81)

REDIRECT EXAMINATION

BY MR. MOORE:

Q. Mr. Wilkinson, would you stand in between those two trains, facing one of them, and hold out your arm and not watch the other one? A. Not if I knew the other one was coming.

(81)

RECROSS EXAMINATION

BY MR. TOWNSEND:

Q. Is that the ordinary and usual clearance between tracks? A. That is our standard—13 foot centers, from center of track to center of track.

(82-83)

R. L. DICKENS, a witness called on behalf of the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

* * * * * *

Q. How long have you been an employee of the Atlantic Coast Line Railroad? A. Five years this December.

Q. You were employed in January, 1937, weren't you? A. Yes, sir.

Q. In what capacity are you employed by the Atlantic Coast Line Railroad Company? A. As a brakeman.

Q. Are you a regular brakeman? A. No, sir.

Q. Were you a member of the train crew operating a

train of freight cars which left Acca on the evening of March 20, 1940? A. Yes, sir.

Q. Were you a brakeman on that train? A. Yes, sir.

Q. Were you the only brakeman on that train? A. I was the only brakeman.

. . . . . .

(84)

Q. Why did your train stop at Clopton Yards? A. For the purpose of picking up cars.

Q. Do you know how many tracks of the railroad company cross Clopton Road at Clopton Yards? A. I believe there are seven.

Q. How many cars were in the train that you came over on from Acca to Clopton? A. I disremember but there were approximately twelve or fifteen cars.

Q. How long have you been on this particular run? A. I have been over this run a number of times but there is no train crew assigned to that run regularly. You might catch that train once a week or you might go a month before you would catch it again. You might catch it twice a week.

Q. The times that you did serve on this particular train did it come over the Belt Line to Clopton Yard and on each occasion pick up cars for movement south? A. Yes, sir.

. . . . . .

(86-88)

Q. What movement, if any, was made by the engine which was operated by Engineer Myrick after you had gotten to your place up on the hill? A. I cut three cars off and we went on down the hill and backed up into slow siding.

Q. You cut three cars off. Do you mean by that you disconnected them from the other twelve or fifteen—whatever the other cars were in the train? A. Yes, sir.

Q. Which track were you on? This lower one? A. This track.

Q. You went on down into the yard until you could throw

a switch to bring you back into slow siding? A. I went down to approximately here and back on slow siding.

Q. How fast did it back? A. Oh, I would say four or five miles an hour.

Q. Where were you when it was backing in the direction of Clopton Road and before it got to Clopton Road? A. I was on the head of the leading car on the engineer's side, giving the signal.

Q. What sort of signal were you giving him? A. A back-up signal.

Q. What does that consist of? A. (Witness indicates with arm)

Q. Rotating the arm in a cirular motion horizontal with the ground? A. Yes, sir.

Q. What sort of a car were you riding on, approaching Clopton Road? A. I was riding on—you call it the end or side also. I was riding at the extreme northern end of the car on the side.

Q. What part of the car did you have hold of? A. The grab iron.

Q. Where were your feet? A. On the foot step.

Q. What kind of a car was that lead car? A. It was a coal hopper car.

Q. You were holding on with which hand? A. I presume I was holding on with my right hand and giving the signal with my left. That is the natural way I would hold.

Q. When you got to Clopton Road you could see that Clopton Road was blocked on the east by the train that was still moving southward down the yard, couldn't you? A. Yes, sir.

Q. So when you got to Clopton Road what did you do? A. When I got to Clopton Road I got off about the center of the crossing to protect the crossing from any other traffic.

Q. What did you do the minute you got on the ground? A. I let the cars roll back a little ways and then stopped the engineer and walked on up to proceed to throw my switch back.

Q. What do you mean by "up"? Do you mean you went southward toward Petersburg? A. Yes, sir.

Q. When you gave the signal to the engineer, Mr. Myrick, to stop, where was the engine—south of you or north of you, or whereabouts? A. I believe the engine was just about at me.

Q. And did he stop immediately? A. Yes, sir.

Q. And where was the engine with reference to this road when it stopped? A. If I am not mistaken, the tank was resting just about on the road, probably not completely over the road—the tank of the engine.

Q. Had such a shift as was made on the evening of March 20th by Mr. Myrick been made on this track on any previous occasion while you were serving as a brakeman on that train? A. I had never been in slow siding before.

* * * * * *

(89-90)

Q. When you stepped off of the step of the end of that coal car, by the time you had reached the ground, state to the jury where the end of the car was that you had just dismounted from? A. I don't know but we weren't moving fast and the car couldn't have been more than a few inches by me by the time I stepped to the ground.

Q. You said you were going four or five miles an hour? A. Yes, sir.

Q. By the time you got to the ground and had come to a standstill from the action on your part of dismounting, where would you say the end of the car was that you had just left? A. Mr. Satterfield, I usually keep a hand hold on the cars until my feet hit the ground and I realize I am not going to fall. Of course, at a speed of four or five miles an hour it wouldn't really be necessary to hold on but I really couldn't say how far the car had gone by me when I stopped.

Q. You were off in the middle of the road? A. Approximately in the middle of the road.

Q. You didn't go to the north side of the road? A. I should say that I probably did.

Q. You probably did? If I may demonstrate to you, I can show you what I mean.

Q. I don't know whether we can get your demonstration in the record, but you can tell it anyway. A. If I was to step off this car in the middle of the road I would probably—

By Mr. Denny:

Q. You mean you would probably take a couple of steps after you step off? A. Yes, sir.

* * * * * *

(92).

By Mr. Satterfield:

Q. Did you hear any whistle or bell sounded on the train in which you were riding? I mean Mr. Myrick's engine with the three cars? A. Mr. Satterfield, I am so accustomed to whistles and bells that they could probably have been ringing and I not paying any attention to them at all, but I can't honestly say a whistle or bell blew or rang because it is something that I wouldn't have paid a great deal of attention to at that time.

* * * * * *

(92-94)

Q. Was there any light on the car which was the lead car other than your lantern? A. No, sir.

Q. Was there any light on the end of the engine? A. Yes, sir.

Q. What kind of a light was it? A. A small electric bulb.

Q. That is located on what part of the apparatus? A. It is on top of the tank in the middle of the end. I don't know how to exactly explain it to you. It would be the center of the tank at the top on the end.

Q. Of the tender? A. Yes, sir.

Q. How many cars were between that light and the end of the back-up movement? A. How many cars between that light and the end of the back-up movement?

Q. Yes. A. I was holding three cars.

Q. How many cars were between that light and the end of that back-up movement? A. Two cars between the engine and the car I was riding on.

Q. I am not asking you about the car you were riding. How many cars were between the light you have just described to the Gentlemen of the Jury on the tender and the front end of that back-up movement? A. Three cars.

Q. How high are those cars, do you know? A. No, sir.

Q. Was there anyone else on the end of that back-up movement beside you? A. No, sir.

Q. Who ordered you to make that movement? A. The Yardmaster, Mr. Jones.

Q. You didn't get those instructions from your conductor? A. No, sir.

(94-97)

CROSS EXAMINATION

BY MR. TOWNSEND:

. . . . . .

Q. About how many times, do you suppose, in the three and one-half years that you had run on First 209? A. I can't answer exactly but I would say maybe a dozen or maybe twenty.

Q. Maybe a dozen or maybe twenty times in the three and one-half years? A. Yes, sir, or possibly just a few more times.

Q. Is it always necessary to shift cars when First 209 reaches Clopton Yard? A. It is always necessary to pick up cars and shift them back to our train.

Q. When you pick up cars there the movement of the road engine would be to get out of the way, wouldn't it? A. Would what?

Q. The movement of the road engine would be to get out of the way and let the yard engine put the cars of First 209 up to the cut on the hill? A. No, sir.

Q. What would be your movement? A. My movement when I arrive at Clopton—it all depends on what the cars from the freight house would consist of.

Q. That is what I am getting at. If there is no necessity for any classification, then all you have to do is get out of the way, get the road engine out of the way? A. If there was no necessity for classification?

Q. Yes. For instance, you would hold to the Weldon cars or you would hold to the Petersburg cars and go in one of the sidings there so as to let the yard engine make up the train, wouldn't you? A. No, sir. If there had to be classification, I would get out of the way. If there did not have to be any classification I would pick these cars up and set them to my train myself.

Q. Then there would be no occasion for any shifting. What portion of the time do you suppose there would be when there would be no shifting for First 209? A. I would say—when there wouldn't be any shifting?

Q. When there wouldn't be any shifting? A. Oh, a fourth of the time.

Q. And the road engine would simply attach to the train and go on off? A. A fourth of the time, approximately.

Q. But if there were shifting to be done, as I understand the make-up of First 209, you have the Weldon cars in front of the train, don't you? A. Yes, sir.

Q. Next to that comes what? A. Petersburg.

Q. Next to that the Petersburg cars and after that would come the cars for South of Rocky Mount? A. Yes, sir.

Q. So that if you came in with Petersburg cars and there were no Petersburg cars in the cut of cars that came from South Richmond, then there would be no occasion to do any shifting so far as Petersburg cars were concerned at all, would there? A. No, sir, I would just have to hold to my Petersburg cars and pick up.

Q. Hold to your Petersburg cars and pick up and the yard engine would put the rest of the cars that were brought in on First 209 to the cut that were to go? A. If I arrived

at Clopton with Weldon and Petersburg and through cars, and the yard engine has Petersburg cars and through cars for me, my move is to hold my Weldon cars and get out of the way. The yard engine would pick up what Petersburg cars I had.

Q. What cars you had or he had? A. That is, if I had Weldon cars, what Petersburg cars that I had he would set over to my pick-up. The yard engine would go on and I would come to the cars he brought and come back to my train.

* * * * * *

(98-100)

Q. Did the Yardmaster come to you there? Did you see the Yardmaster there? A. Yes, right in the vicinity of Clopton Road.

Q. And he told you to hold to three empty Petersburg cars and to go in slow siding? Yes, sir.

Q. And you went down below the switch, threw the switch, and gave your engineer the sign to back up into slow siding; is that right? A. Yes, sir.

Q. Did you see anyone or any light in the vicinity of Clopton Road when you were riding that cut of cars back up to the road? A. No, sir.

Q. Did you hear any outcry or hear any noise? A. No, sir.

Q. While you were doing that what movement was the yard engine and the cars it brought from Richmond making? A. When I was backing into slow siding?

Q. While you were backing into slow siding. A. The yard engine had cut off and it pulled down on the main line in order to make a switch to our train.

Q. I understand you to say that you got off of the lead car about the center of Clopton Road? A. Yes, sir.

Q. For what purpose were you riding that lead car back to Clopton Road? A. To protect the road crossing. I am getting my directions, east and west, mixed up—to protect my road crossing from traveling coming this way, westbound traveling.

Q. Coming from the west, you mean? A. Coming from the west, yes.

Q. As I understand you to say, the east side of the crossing was already protected by the cut of cars coming in from Richmond, was it not? A. Yes, sir.

Q. So that you wanted to protect your train from any traveling coming from the west. Would it have been necessary for you to have a lantern or to ride that cut of cars except for Clopton Road? A. No, sir, it wouldn't have been necessary for me to ride it back at all if it hadn't been for Clopton Road.

Q. Do you have to carry a lantern on the end of a cut of cars shifting in the yard at night? A. No, sir.

Q. Except at a road crossing? A. A lantern is used generally for a signal and I would have had a lantern that night to signal my engineer. That is a night signal, a white lamp, but I wouldn't have been on the cars riding back if it hadn't been for Clopton Road crossing.

* * * * * *

(100-102)

Q. In what direction were you facing when the backward movement was made over Clopton Road? A. North.

Q. You were facing north. How far is the grab iron and step from the end of the car, from the north end of that car? A. It is right on the extreme end of the car.

Q. And you were on the west side, the right-hand side of the car, and at the extreme end of the northernmost hopper car when you passed over the crossing? Is that right? A. Yes, sir, I was on the west side of the car, the extreme end.

Q. The west side of the car and the extreme north end of the box car? A. Of the hopper car.

Q. Were you giving that circular movement with your lantern, the back-up signal, until you got off the hopper car? A. Yes, sir.

Q. When you got off of the car you were facing north? A. Yes, sir.

Q. Did you or not take any steps further toward the north as you got off the car? A. There was just the slightest movement that would make me take a couple of steps.

Q. You would have to get off the car facing north, would you not, or you would be thrown? A. Yes, sir.

Q. If you attempted to get off the car toward the south you would be thrown? A. Yes, sir, more than apt to.

Q. So that you took several steps after you touched the ground along with the motion of the car? A. Yes, sir.

Q. You think then that you were near the north side of the road when you came to a standstill? A. I should say I was, yes, sir.

. . . . . .

(105-107)

RECROSS EXAMINATION

BY MR. TOWNSEND:

. . . . . .

Q. Is there any rule that you have ever heard of that required you to stop just before you got to Clopton Road? A. No, sir.

. . . . . .

BY THE COURT:

Q. I want to ask you a question, Mr. Dickens. After you had thrown the switch and boarded the train that was backing into slow siding, how far was the place that you boarded the train south of Clopton Road? A. Three or four car lengths.

Q. And how far is that? A. Approximately 100 feet or 120 feet.

Q. Was it dark? A. Yes, sir.

Q. Was there any light from the trains along the track at

all in front of the back-up movement that the train made? A. Nothing but my lantern in my hand.

(107-113)

P. W. WRIGHT, a witness called on behalf of the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

* * * * * *

Q. Mr. Wright, were you Engineer Myrick's fireman on the evening of the 20th of March, 1940? A. Yes, sir.

Q. Did you fire the road engine which he was operating out of Acca Yard for Meadow, Virginia? A. Yes, sir.

* * * * * *

Q. Who was in the engine? A. Mr. Myrick.

Q. You were on the fireman's side? A. Yes, sir, on my seat box.

Q. And he was on his side? A. Yes, sir.

Q. Who was handling the front end of that back-up movement of those three cars? A. Mr. Dickens, our brakeman.

Q. Was he or was he not on your side of the train? A. He was on the engineer's side. The engineer was handling all the signals.

* * * * * *

Q. When you came to a standstill were you still on the fireman's seat? A. Yes, sir.

Q. What happened then? A. I saw a little beam of light just the other side of the road crossing and I thought probably it was a car sitting over there shining its light through the brake rigging.

Q. Over on the left-hand side? A. Yes, and I walked over on the engineer's side and looked out and there wasn't a car there. We were stopped at that time and I got up and walked over to the engineer's side and I had a flashlight in my pocket in my overalls and I got down on my side and walked back on the road crossing and shined my light down there and I seen a flashlight. Well, I shined it up a little farther and I seen a man's cap, so I turned around and went back to the engine to get Mr. Myrick and tell him what I had seen and Mr. Myrick got down off the engine and I handed Mr. Myrick my flashlight.

Q. How far from that road did you find that flashlight? A. Just a few inches, just this side of the embankment there.

Q. Come here and point to the jury where you saw it. A. As I remember, this is slow siding and this is southbound and it was laying right there.

Q. Just a few inches from the southbound line of the road? A. Yes, sir.

Q. Was it lit? A. Yes, sir. A little beam of light showed about eighteen inches long.

Q. Did I understand you to say it was between the southbound track and the slow siding? A. Yes, sir.

Q. How far on then did you find the cap? A. I don't know exactly. It was underneath the second car that we had hooked up, underneath the middle car.

Q. Did you find any other property? A. It was laying on the end of the cross ties and his gun was laying up further, between that and the rear of the train.

Q. How long have you been working with the railroad company? A. Since February 11, 1937 is my seniority date.

Q. You have been working for them since 1937? A. Yes, sir, off and on.

Q. Did you just begin to work for them in 1937? A. Yes, sir. Well, I worked in the shops for a couple of months.

Q. I mean on the road? A. That is right.

Q. When you got back to the end of the car did you see Mr. Tiller? A. Mr. Myrick and myself both, when we went

back there, Mr. Tiller was there but I didn't go back there by myself.

Q. Later on did he make any statement in your presence there where you found him? A. Yes. He asked me what hit him and he asked me who I was and I told him and that is all that I remember. He asked me when the ambulance was coming and I told him they had ordered one and it would be here right away, I thought.

Q. At the times that you have been assigned to that run in handling that particular assignment on that train as fireman, have you ever made that same back-up movement that was made on March 20th? A. No, sir, I had always got in the clear on the south side.

Q. You had always got in the clear on the south side of this road? A. Yes, sir, down beyond the cross-over.

(113-116)

CROSS EXAMINATION

BY MR. DENNY:

* * * * * *

Q. You had been working just about three years at the time of this accident? A. Well, yes.

Q. How many times during that three years would you say that you had been assigned to this run that you were on that night? A. Up until the time of the accident?

Q. Yes. A. Not more than twelve or fifteen times at that time, I don't believe. I had never been through there more than fifteen or twenty times. I don't believe I had been through there more than five or six times in the past year.

* * * * * *

Q. As you were making that back-up movement I suppose you had been facing to the north? A. That is right.

Q. Did you see any light or any beam of light around

the crossing before you came to a stop? A. No, sir, I didn't see a thing.

Did you see anything that caused you to think a man might be down there turning a flashlight on and off? A. No, sir.

Q. Did you hear any outcry back there behind you? A. No, sir, I didn't hear anything unusual.

Q. There was nothing there? In sitting in the position you were in your cab you can see down the area between the cars on slow siding and the cars on the southbound main line, can you not? A. Yes, sir. We have the distance between the tracks of four feet, I think.

Q. There was nothing there to obstruct your vision? A. No, sir.

Q. And I understand you to say as you were making that movement you were looking down in that direction? A. Yes, sir.

Q. Was your bell ringing as you were backing up? A. Yes, sir.

Q. Is that an automatic bell? A. Yes, sir.

* * * * * *

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(122)

BURTON A. ANGLE, a witness called by the plaintiff and being first duly sworn, testified as follows:

* * * * * *

(124-127)

CROSS EXAMINATION

BY MR. TOWNSEND:

Q. Mr. Angle, what are your duties or what are the duties of a Special Officer of the railroad? A. Our main duties in railroad yards are to protect the merchandise, police our trains.

Q. Police the trains? A. Yes.

Q. Where do you ride? Where do the men ride on these freight trains? A. We don't have any particular place to ride. We ride most any place on the train.

Q. Do you ride on top of the train? A. On top, in box cars and occasionally on the engines.

Q. Within the last fifteen years have you ridden first section of 209 at times? A. Yes, sir.

Q. Can you say how often? A. No, I couldn't say how often. I rode occasionally. For the last eight years I have just been riding it occasionally.

Q. About eight years ago? A. About eight years ago I was assigned to ride it for a while regularly. I rode it for a month at a time.

Q. Have you ridden it at times with Sergeant Tiller? A. Yes, sir.

Q. Have you at times seen the road engine of First 209 back into slow siding? A. I have noticed it back in there. I couldn't say just how many times. I have noticed them backing those cars.

Q. Are you ever told about the switching movements in advance of when they are made? A. No, sir.

Q. What are the duties of the Special Officers as to taking care of themselves on the yard? A. Well, we have to look out for ourselves on the yard, looking out the best we can.

Q. Does anybody know where you are when you are riding on the train? A. Not at all times.

Q. Do you sometimes ride the trains when you don't want anybody to know where you are? A. Sometimes we are assigned to ride them and nobody is supposed to know where we are.

* * * * * *

Q. What clothes did he have on? A. Mr. Tiller was dressed for the winter. He had on his leather coat, outside coat, as near as I can remember, and then he had on a

leather vest and he had a vest under that and one of these heavy lumber shirts and heavy underwear.

Q. What else did he have on, if anything. A. I don't recall whether an overcoat or not. It seems to me he had an overcoat on but I wouldn't like to say about the overcoat.

Q. Did he have on heavy or light underwear? A. He had on heavy underwear.

Q. Do you know how long Sergeant Tiller had been running on this run regularly? A. Sergeant Tiller had been with the company sixteen years and I think most of that sixteen years was riding that train, 209.

Q. How would he get down to Clopton Yard usually? Would he ride the train? A. Yes, sir.

Q. Did he go other ways sometimes? A. Occasionally.

Q. Would he ever ride it from Acca? A. I wouldn't say. I know he has rode it from Acca but I don't know how many times.

(127-130)

MR. SATTERFIELD: We have a document we wish to present and we ask to introduce in evidence a certificate at this point.

THE COURT: Is there any objection? Have you shown it to the other side?

MR. MOORE: They have copies of it.

MR. SATTERFIELD: It has already been referred to.

THE COURT: Gentlemen, you may step out in the hall.

NOTE: The jury retired.

THE COURT: Do you gentlemen wish to be heard any further on the admission of this paper?

MR. DENNY: I think Mr. Townsend fully covered our point. The Virginia Statute requires the report and the Federal Statute requires a report and the Federal Statute says that the report made to the Federal Government shall not be admitted. I see no reason for going further unless your Honor wishes to hear it.

THE COURT: The objection is overruled and the statement is admitted in evidence. Your objection is not as to the form of it?

MR. DENNY: Our objection is not to the form. Our objection is to the competency and materiality of it.

MR. MOORE: I wanted to call attention of the Court to this: Mr. Denny has agreed to stipulate, for the purpose of the trial, that this report was made by Mr. J. A. Wall, I think the name is, who is Superintendent of the transportation branch of the Atlantic Coast Line Railroad, that it is a report by him acting within the course of his authority for the company, and so forth.

MR. DENNY: It is a report signed by Mr. Wall who occupied that position.

THE COURT: It is received and the stipulation is made a part of the record.

MR. DENNY: It is understood, of course, that stipulation simply goes to the authenticity of the paper and does not go to the question of materiality of competency.

* * * * * *

THE COURT: It will be received and you except?

MR. DENNY: Yes, sir.

* * * * * *

(131-132)

MR. SATTERFIELD: We rest at this point.

MR. DENNY: We have a motion we would like to make in the absence of the jury.

(The jury retired.)

MR. DENNY: If the Court please, I wish to move that the evidence be stricken or that we be awarded a directed verdict in favor of the defendant for the following two reasons:

The evidence discloses no actionable negligence on behalf of the Atlantic Coast Line Railroad Company, its officers, its agents or servants.

Secondly, the manner in which the plaintiff's decedent came to his death is purely a matter of speculation, conjecture and random judgment.

THE COURT: What was the second?

Mr. DENNY: That what Mr. Tiller was doing at the time of his death was purely a matter of conjecture, speculation and random judgment. We know he was run over but under what conditions we do not know. I think our motion is sound on both grounds.

. . . . . .

(141)

DIRECTED VERDICT OF THE COURT

THE COURT: Gentlemen of the Jury, the defendant has moved the Court to direct the jury to return a verdict for the defendant. This motion the Court has granted and the Court has directed the Clerk to write a verdict finding for the defendant, and I ask that you designate one of your members to sign that verdict as foreman.

Report of Accident resulting in injury to persons, equipment or roadbed.

(State Corporation Commission)
(April 24, 1940)
(Va.)

PLAINTIFF'S EXHIBIT NO. 3

To the Honorable State Corporation Commission,

RICHMOND, VIRGINIA.

The Atlantic Coast Line Railroad Company makes the following

REPORT OF AN ACCIDENT

which occurred near Clopton, Virginia, Station on the 20th day of March, 1940, at 7:15 o'clock P. M.

Nature of Accident

Police Officer of the Railroad Company struck and partly passed over by freight car in yard.

Name of Each Person Injured and Nature and Extent of Injury.—J. L. Tiller, white, 52 years of age, Police Sergeant of the ACL RR Co., went with yard engine taking cut of cars to Clopton, Va., to be placed in freight train stepped off engine upon arrival and was looking over the cars as they passed. He was standing on adjoining track for this purpose when road engine with several cars ahead of engine backed into this track. He was struck by the first car and dragged several feet receiving injuries which resulted in death in Grace Hospital, Richmond, Va., at 4:25 A. M., March 22nd, 1940.

Damage to Equipment

None

Damage to Roadbed

None

(Sign Here) J. A. WALL

(Title) Superintendent Transportation

To be forwarded to State Corporation Commission at end of calendar month, with abstract of all accident reports to that Department for such month.

COMMONWEALTH OF VIRGINIA

(Seal of Virginia)

DEPARTMENT OF THE

STATE CORPORATION COMMISSION

I, N. W. Atkinson, Clerk of the State Corporation Commission do hereby certify that the foregoing is a true copy of report filed by Atlantic Coast Line Railroad Company covering an accident on March 20, 1940, which resulted in the death of J. L. Tiller.

In Testimony Whereof I hereunto set my hand and affix the Official Seal of the State Corporation Commission, at Richmond, this 28th day of August, A.D. 1941

(Seal of State Corporation Commission)

(Sgd) N. W. ATKINSON,

Clerk of the Commission.

ORDER OF FINAL JUDGMENT

(Entered and filed October 6, 1941)

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, PLAINTIFF,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia corporation, DEFENDANT.

CIVIL ACTION FILE NO. 129.

Upon consideration of plaintiff's motion to set aside the verdict of the jury and to award her a new trial upon all issues, it is ordered that said motion be, and is hereby overruled, and that judgment be entered for defendant on the verdict of the jury, to all of which plaintiff, by counsel, excepted.

(Sgd) ROBERT N. POLLARD,

United States District Judge.

E. H. Wamack,

Direct:

[fol. 70] Q. What part of the train did you occupy as you went over to Clopton Yard?

A. I was riding on the engine.

Q. Who was in the engine with you, Mr. Wamack, do you remember?

A. I wasn't in the engine. I was on the rear of the engine which is known as the tender,—Mr. King, Mr. Elkie and myself.

Q. Mr. King, Mr. Elkie and you and Mr. Linton, the engineer, of course, and who was the fireman?

A. Cole, T. A. Cole.

Q. Who was on the rear end of your train?

A. There wasn't anybody on the rear end of the train.

Q. Nobody?

A. No.

Q. You were all in the cab?

A. No, we was on the tender on the back of the engine.

Q. When you say on the tender, do I understand you to mean that little passage way that is not in the cab but between the cab and where you get the coal?

A. The tender carries the water and we were on the south end of it. There are foot board steps that you ride on and also a hand rail.

Q. What we laymen would call the rear end of the engine and tender you were riding on, the step that goes across the back of the tender?

A. That is right.

Q. You and Mr. Elkie were on that?

A. We was on the rail—Mr. Elkie, Mr. King and myself.

Q. All three of you?

A. Yes, sir.

Q. Did you see Mr. Tiller? You said you never saw him [fol. 71] until after the accident occurred?

A. Not from the time I spoke to him in Richmond yard until after the accident occurred.

[fol. 72] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4909

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Appellant,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

February 4, 1942, the transcript of record is filed and the cause docketed.

Same day, the original exhibits are certified up.

February 6, 1942, the appearance of J. Vaughan Gary and Richmond Moore, Jr., is entered for the appellant.

Same day, the appearance of J. M. Townsend and Collins Denny, Jr., is entered for the appellee.

Same day, stipulation to continue case to the April Term, 1942, is filed.

ORDER CONTINUING CASE TO APRIL TERM—Filed February 9, 1942

(Style of Court and Title Omitted)

Upon the Joint Stipulation of the parties, by their respective counsel, and for good cause shown,

It is Ordered by this Court that the above entitled cause be, and the same is hereby, continued from the Term beginning March 9, 1942, to the Term beginning April 13, 1942, of this Court, and that the appellant do file her brief in the Office of the Clerk of this Court on or before March 10, 1942, and that the appellee do file its brief in the office [fol. 73] of the Clerk of this Court within four weeks thereafter.

Armistead M. Dobie, U. S. Circuit Judge.

February 7, 1942.

Endorsed: "We ask for this Richmond Moore, Jr., Counsel for Appellant. Collins Denny, Jr., Counsel for Appellee."

February 13, 1942, statement under section 3 of rule 10 is filed. Service accepted.

March 9, 1942, joint appendix to briefs of respective parties is filed.

Same day, brief on behalf of the appellant is filed.

April 3, 1942, brief on behalf of the appellee is filed.

April 10, 1942, reply brief on behalf of the appellant is filed.

ARGUMENT OF CAUSE

April 13, 1942, (April term, 1942) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 74] OPINION—Filed May 19, 1942

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4909

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Appellant,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

(Argued April 13, 1942. Decided May 19, 1942)

Before Parker, Soper and Dobie, Circuit Judges

Richmond Moore, Jr. and J. Vaughan Gary for Appellant, and Collins Denny, Jr., and J. M. Townsend for Appellee.

[fol. 75] SOPER, Circuit Judge:

John Lewis Tiller, a sergeant of police in the employ of the Atlantic Coast Line Railroad Company, was fatally injured while on duty at 7 P. M. on the evening of March

20, 1940, when he was struck by a railroad car in the Clopton Yard of the Railroad Company near Richmond, Virginia. Upon the trial of the suit by his executor against the Railroad Company for damages for his death under the Federal Employers' Liability Act of April 22, 1908, as amended by the Act of August 11, 1939, 45 U. S. C. A. 51, et seq., the District Judge directed a verdict for the defendant upon the ground that the evidence disclosed no negligence on the part of the carrier. The case largely turns on the meaning of the amendment of 1939 whereby § 4 of the Act was changed to add the provision that in any action under the Act to recover damages for the death of an employee, the employee shall not be held to have assumed the risk of his employer's negligence. See 45 U. S. C. A. 154. It is the contention of the appellant that by reason of this amendment the carrier may no longer rely upon the rule that as employees in railroad yards are aware that cars and engines move in all directions at irregular intervals, they assume the risk and must be on the lookout for their own safety so long as the movement is not unusual.

The defendant carrier operates each evening a freight train from Richmond to the south in two sections. Cars from the north are assembled at the Acca Yard of the Richmond, Fredericksburg & Potomac Railroad, and brought thence by a road engine to the Clopton Yard on the south side of the James River. Richmond cars are assembled at Byrd Street Station of the carrier, on the north side of the river, and are taken thence to the Clopton Yard. These cuts of cars arrive about the same time and are there as- [fol. 76] sembled for further transportation in such order that they may be conveniently dropped off at divers southern points.

Running through the Clopton Yard from east to west is the Clopton Road that is open to the public. Coming from the north of the road are three parallel tracks, of which the easternmost is the northbound main line, the center the southbound main line, and the westernmost is known as the slow siding and is used for shifting operations. Coming in from the northwest are the tracks from the Acca Station which also cross the Clopton Road to the west of the slow siding and connect with it south of the road.

Tiller had been in the employ of the Railroad Company for sixteen years, and was familiar with the layout of the tracks in the Clopton Yard and with the operation of the cars and the make-up of the trains. It was his duty as a member of the police force to guard the merchandise in the trains, to inspect the seals on the cars, and in the performance of his duty he rode the trains at such places as he saw fit. He followed no regular routine in coming to the Yard to police this particular train. He was seen at the Byrd Street Yard before the cars left that point on the night in question, and it is a fair inference that he rode on the cars from Byrd Street to Clopton Yard, although no one saw him on the cars or knew where he rode. He likewise followed no routine in checking the seals on the cars but did this work in various places in the yard.

The assembly or classification of the cars in making up the train requires the shifting of the cars back and forth, and employees, including police officers within the yard, are instructed that they must watch out for the movement of the trains as no employee watches out for them and no lights are used at night on the head end of [fol. 77] back-up movements except when an employee is placed at the back end with a lantern to protect a road crossing.

On the night in question, the cars from the Acca Station came into the Clopton Yard from the northwest, and the engineer was instructed to cut off three cars from his train and to go southwardly across the Clopton Road until he reached the slow siding and then to back up on the slow siding northwardly. These movements were made. In the meantime the cars from the Byrd Street Station had come south on the southbound main line. The evidence indicates that Tiller was standing on the slow siding, or between the slow siding and the southbound main track, inspecting the seals on the cars from Byrd Street that were on the southbound main track. He was struck a short distance north of the Clopton Road by the back-up movement of the cars from Acca Station on the slow siding. While no one saw the accident, this account is justified by the finding of Tiller's flashlight a few feet north of the Clopton Road and the finding of his cap and his pistol at intervals a few feet further north, and finally by finding him under the wheels on the east side of the rear end of the head car. The brakeman on the car in the back-up movement was

riding on the west side near the end of the head car holding a lantern with which he gave signals to the engineer as they approached the Clopton Road, but it was his duty to look out for traffic on the Clopton Road and he did not see Tiller standing to the east of the train. The automatic bell on the engine attached to the cars in the back-up movement was ringing at the time.

The distance between the western rail of the southbound main line track and the eastern rail of the slow siding was 7 feet 11½ inches. This distance was reduced by the overhang of the cars moving in opposite directions on the [fol. 78] two tracks to 3 feet 7½ inches, so that there was sufficient room for a man to stand in safety between slowly moving cars on the two tracks; but it is probable that Tiller did not hear cars approaching on the slow siding from the south.

There was some evidence on the part of the plaintiff that there was an error in the classification of the cars at Byrd Street, which necessitated the classification at the Clopton Yard. There was also evidence on the part of employees on the cars from the Acca Yard that they had not made this particular movement on prior occasions. But these employees had been on this particular run for only a few times in several years, and the evidence as a whole leaves no doubt that the Clopton Yard is a classification yard and that movement on the slow siding was in no sense unusual. It follows that the case presents no exception to the rule concerning the duty of railroad employees in freight yards to look out for their own safety, and the question for determination is whether this rule has been modified by the amendment of 1939 to the Employers' Liability Act.

Prior to the amendment of §4 of the Act, it was well settled that carriers had the right in actions under the Act for damages to rely upon the defense that their employees assumed the ordinary risks of their employment. This right was limited only by the provision of §4 that the employees should not be held to have assumed the risks of their employment in any case where the violation by the carrier of any statute enacted for the safety of the employees contributed to the injury or death of the employee. Specifically it was held that in the movement of cars in a railroad yard by day or by night a carrier was under no duty or obligation to look out for the employees

within the yard or warn them of the approach of cars in [fol. 79] the ordinary manner by the blowing of whistles, the ringing of bells or the display of lights or otherwise.

Thus, in *Toledo, St. L. & W. R. R.* v. *Allen*, 276 U. S. 165, 168, 169, 170, 171, in the case of a car checker, it was said:

"The plaintiff cannot recover in the absence of negligence on the part of the defendant. Seaboard Air Line v. Horton, 233 U. S. 492, 502. And, except as specified in §4 of the Act, the employee assumes the ordinary risks of his employment and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees. Boldt v. Pennsylvania R. R. Co., 245 U. S. 441, 445; Ches. & Ohio Ry. v. Nixon, 271 U. S. 218."

"• • • The work of checking cars in a yard at night where switching is being done is necessarily attended by much danger. But fault or negligence may not be inferred from the mere existence of danger or from the fact that plaintiff was struck and injured by the moving car. Defendant did not owe to plaintiff as high a degree of care as that due from carriers to their passengers or others coming on their premises for the transaction of business. The reason for the distinction is that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against the defendant. Missouri Pacific Railroad Co. v. Aeby, 275 U. S. 426."

"• • • On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of [fol. 80] the shunted car. Aerkfetz v. Humphreys, supra." (145 U. S. 418.)

And in *Missouri Pac. R. R.* v. *Aeby*, 275 U. S. 426, in the case of an employee slipping on ice on a station platform, the court said: (pp. 429, 430)

"Under the circumstances, it cannot reasonably be held that failure of petitioner to remove the snow and ice violated any duty owed to her. The obligation in respect of

station platforms and the like owed by carriers to their passengers or to others coming upon their premises for the transaction of business is greater than that due their employees accustomed to work thereon. The reason is that the latter, familiar with the situation, are deemed voluntarily to take the risk of known conditions and dangers. Tuttle v. Milwaukee Railway, 122 U. S. 194. The facts of this case, when taken most favorably to the respondent, are not sufficient to sustain a finding that petitioner failed in any duty owed to her."

To the same effect were *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 420; *Ches. & Ohio Ry.* v. *Nixon*, 271 U. S. 218, 219; *Delaware, &c. R. R. Co.* v. *Koske*, 279 U. S. 7, 11; *Southern Ry Co.* v. *Verelle*, 4 Cir., 57 F. 2d 1008; *Fernald* v. *Boston & M. R. R.*, 2 Cir., 62 F. 2d 782; *Norfolk & Western R. Co.* v. *Collingsworth*, 6 Cir., 32 F. 2d 561; *Connelly* v. *Pennsylvania R. Co.*, 3 Cir., 201 F. 54.

These decisions clearly show that liability on the part of the carrier was denied because it was guilty of no neglect in failing to safeguard the injured employee from the ordinary risks of the business; and the reason given was that the employee assumed the risks and in effect agreed to look out for himself. The appellant claims that this situation is now changed by the addition to §4 of the provision that "such employee shall not be held to have assumed the risks of his employment in any case where such injury [fol. 81] or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." The argument is that as the doctrine of the assumption of the risk has been abolished in this respect, the carrier can no longer interpose it as a shield against the consequences of its neglect and hence is liable for injuries to its employees in its railroad yards or elsewhere, unless it takes precautions for their safety commensurate with the danger that they are likely to encounter.

Superficially considered, the argument seems to follow a logical sequence; but it loses its force when the true nature of the doctrine is understood. It is necessary to bear in mind that the phrase "assumption of the risk" is used in more than one sense and that it is not true to say, as the appellant's argument implies, that in every case where the doctrine was formerly applicable, there was negligence on the part of the employer. The truth is that there may be assumption of the risk by an employee with-

out negligence either on his part or on the part of his employer. At common law a master was not responsible to his servant for injuries which did not flow from the master's neglect but were inherent in the nature of the business. The risk of these dangers the employee assumed, and it was in this sense that the phrase was originally used. So it was said in the quotation from *Missouri Pacific R. R.* v. *Aeby*, 275 U. S. 429, 430, above set out, in explaining the greater obligation owed by a railroad carrier to its passengers than to its employees, "the reason is that the latter, familiar with the situation, are deemed voluntarily to take the risk of known conditions and dangers."

But there is another sense in which an employee is said to assume the risk, that is, when he has knowledge that his safety is endangered by some neglect on the part of [fol. 82] his employer and nevertheless continues to work without complaint and without promise of repair or remedy. Not long after the Employers' Liability Act was passed, it was argued on behalf of a railroad employee in a Virginia case, *Southern R. Co.* v. *Jacobs*, 116 Va. 189, that the defense of the assumption of the risk in the last mentioned sense was no longer available to a railroad carrier, and that the Act was intended to be punitive of negligence and did not cast on the employees of a carrier an assumption of the risk of any condition caused by the carrier's neglect. But this contention was rejected by the Virginia court; and its decision was affirmed in *Jacobs* v. *Southern R. Co.*, 241 U. S. 229, 234, where it was pointed out that the defense was abolished by §4 of the Act only where the negligence of the carrier is in violation of some statute enacted for the safety of employees, and that the defense was still available not only as to "the ordinary risks inherent in the business—the unavoidable risks which are intrinsic notwithstanding the performance by the carrier of its personal duties", but also as to "the secondary and ulterior risks arising from abnormal dangers due to the employers' negligence." See also, *Boldt* v. *Pennsylvania R. R. Co.*, 245 U. S. 441; *Delaware, &c. R. Co.* v. *Koske*, 279 U. S. 7.

It was to cut off this right of the carrier to avoid the consequences of its own neglect and in recognition of the needs of employees exposed to the grave hazards of railroading that the amendment of 1939 was enacted. Under the section

in its original form the carrier had been exculpated from liability in such a hard case as *Hallstein* v. *Pennsylvania R. R. Co.*, 6 Cir., 30 F. 2d 59, where an employee was held to have assumed the risk of his employer's failure to furnish a safety belt although he had demanded it and pro-
[fol. 83] ceeded with the work only when threatened with discharge. This case was mentioned in Report No. 661 of the Senate Committee on the Judiciary of the 76th Congress, 1st Session, of June 22, 1939, as illustrating an exceptionally harsh feature of the rule which it was desired to eliminate; and it is clear from the report as a whole that the purpose in mind was to enlarge the employees' protection by providing that in all cases in which injury results from the negligence of an employee or fellow servant, the defense of assumption of the risk should no longer be available, and at the same time to retain the provision of the existing law that the employer should be deprived of the defense if the violation of any safety statute should contribute to the injury of an employee.

It is significant that Congress made no provision in the amendment with respect to the other risks to which railroad workers are exposed, namely, the ordinary risks inherent in railroading despite the use of the required safety appliances and the exercise of due care by a carrier for the protection of its men. The amendment speaks only of injuries resulting from the carrier's negligence, and does not attempt to raise the standard of care required of a carrier with respect to the safety of its employees in the performance of their duties in railroad yards and other places of danger. The omission is especially noticeable in view of the pains which Congress has taken from time to time in the passage of statutes for the protection of railroad employees. See the *Safety Appliance Acts*, 45 U. S. C. A. §§ 1-16. The conclusion is inescapable that Congress did not intend to enlarge the obligation of carriers to look out for the safety of their men when exposed to the ordinary risks of the business, and that in circumstances other than those provided for in the amended section of the statute, the doctrine
[fol. 84] of the assumption of the risk must be given its accustomed weight. It is beyond the power of this court to deny the defense in this case. It presents no material difference of fact from situations considered by the courts in numerous decisions and held to be free from negligence

on the part of the carriers, and we have no authority to prescribe new standards of conduct in the important field of railroad operations. See *Delaware, &c. R. Co.* v. *Koske*, 279 U. S. 7, 11; *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 170.

Affirmed.

[fol. 85] JUDGMENT—Filed and Entered May 19, 1942

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4909

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Appellant,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Senior Circuit Judge. Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

June 15, 1942, petition of appellant for a stay of the mandate is filed.

ORDER STAYING MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI—Filed and Entered June 15, 1942

(Style of Court and Title Omitted)

Upon the Application of the appellant, by her counsel Richmond Moore, Jr. and J. Vaughan Gary, and for good [fol. 86] cause shown,

It Is Ordered that the mandate of this Court in the above-entitled case be, and the same is hereby, stayed pending the application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

John J. Parker, Senior Circuit Judge.

June 15, 1942.

July 13, 1942, petition for further stay of the mandate is filed.

ORDER FURTHER STAYING MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI—Filed July 17, 1942

(Style of Court and Title Omitted)

Upon the Application of the appellant, by her counsel Richmond Moore, Jr. and J. Vaughan Gary, and for good cause shown,

It Is Ordered that the mandate of this Court in the above-entitled case be, and the same is hereby, further stayed pending the application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

July 15, 1942.

John J. Parker, Senior Circuit Judge.

[fol. 87] STIPULATION AS TO RECORD FOR USE IN SUPREME COURT—Filed July 31, 1942

(Style of Court and Title Omitted)

It is hereby stipulated and agreed between counsel for the parties hereto that both for the purpose of consideration of the petition for writ of certiorari and for the hearing in event the petition for writ of certiorari is granted, the cer-

tified transcript of the record and the printed record shall consist of the following:

(1) The joint appendix to the briefs of appellant and appellee filed in the United States Circuit Court of Appeals for the Fourth Circuit in this action.

(2) The pleadings and orders in the United States District Court for the Eastern District of Virginia in this action.

(3) The proceedings in and the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in this action.

(4) Pages 55 and 56 of the court reporter's transcript of the evidence in the District Court of the United States for the Eastern District of Virginia in this action, beginning with the second question on page 55 and ending at the conclusion of the fourth answer on page 56.

(5) This stipulation.

It is further stipulated and agreed that the original of plaintiff's exhibit No. 2 shall be certified to the Supreme Court of the United States and filed in this case in that court.

[fol. 88] Dated at Richmond, Virginia, this 31st day of July, 1942.

Richmond Moore, Jr., J. Vaughan Gary, Counsel for Appellant. Collins Denny, Jr., Counsel for Appellee.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in said cause, made up in accordance with the stipulation of counsel for the respective parties for use in the Supreme Court of the United States on an application for a writ of certiorari.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 4th day of August, A. D., 1942.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

(1580)

[fol. 81] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 46,797. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 296. Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, Deceased, Petitioner, vs. Atlantic Coast Line Railroad Company. Petition for a writ of certiorari and exhibit thereto. Filed August 12, 1942. Term No. 296, O. T. 1942.